No. 97-____ 97 • 484 SEP 15 1997

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

REGINALD CLEMONS,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

JAMES J. HAGAN
Counsel of Record

SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000

Attorneys for Reginald Clemons

RECEIVED
SEP 15 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80 PP

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether "No, sir" is an ambiguous response to the question of whether a defendant wishes to waive his constitutional right to remain silent, thus permitting the police to continue the interrogation.

2. Whether the Missouri Supreme Court failed to follow the requirements set forth in *Gray v. Mississippi*, 481 U.S. 648 (1987), by permitting a scrupled venireperson who ultimately affirmed his willingness to vote for a death sentence to be *sua sponte* stricken for cause.

3. Whether the use of two duplicate aggravating circumstances—which involve the same indivisible act of the defendant—results in "Double-Counting" in violation of the Eighth Amendment.

PARTIES TO THE PROCEEDING

Petitioner, Reginald Clemons, appears by James J. Hagan, Of Counsel to Simpson Thacher & Bartlett (a partnership which includes professional corporations), 425 Lexington Avenue, New York, New York 10017-3954.

Respondent, the State of Missouri, appears by The Honorable Jeremiah (Jay) W. Nixon, Attorney General of Missouri, and John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES viii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

- Factual Background 3
- The Arrest and Confession of State's Witness Thomas Cummins 3
- The Arrest and Confession of Petitioner Reginald Clemons 5
- Petitioner's Audiotaped Confession 6
- Petitioner's Trial and Conviction 8
  - The Testimony of Thomas 8
  - The Testimony of Daniel Winfrey 9
  - Admission of the Audiotaped Confession 10
  - Petitioner's Conviction 10
- Decision on Appeal 11

REASONS FOR GRANTING THE PETITION 11

Page

POINT I. THE STATE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO REMAIN SILENT 11

A. When Asked If He Wished To Waive His Rights And Make A Statement, Petitioner Responded "No, sir," And Thus The Police Were Obligated To Cease The Interrogation Immediately 11

1. Petitioner Validly Invoked His *Miranda* Rights Because His Response Of "No, sir" Was Perfectly Clear And Unambiguous 12

2. Petitioner's Statements Either Before Or After He Said "No, sir" Cannot Be Used To Cast Doubt On His Assertion Of His *Miranda* Rights 13

a. The events preceding the audiotaped interrogation did not render petitioner's response of "No, sir" ambiguous. 13

b. Petitioner's post-invocation statements cannot be used to establish a waiver of his Miranda rights. 14

B. The Admission Of Petitioner's Statements In Violation Of His *Miranda* Rights Was Not Harmless Error 15

Page

POINT II. THE MISSOURI SUPREME COURT FAILED TO FOLLOW THE REQUIREMENTS SET FORTH IN *GRAY V. MISSISSIPPI*, 481 U.S. 648 (1987), WHEN IT PERMITTED VENIREPERSON VIRTO DOSS TO BE STRICKEN FOR CAUSE 17

A. Venireperson Virto Doss, After Initially Indicating A Conscientious Objection To The Death Penalty, Ultimately And Clearly Stated That He Could Set Aside His Personal Views And Vote For A Death Sentence If The Facts Warranted It 17

B. Under This Court's Holding In *Gray v. Mississippi*, 481 U.S. 648 (1987), The Trial Court Was Prohibited From Excluding Venireperson Doss For Cause 21

POINT III. THE USE OF BOTH A PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE AND A ROBBERY AGGRAVATING CIRCUMSTANCE FOR A SINGLE ACT RESULTED IN "DOUBLE-COUNTING" IN VIOLATION OF THE EIGHTH AMENDMENT 24

A. During The Penalty Phase Of Petitioner's Trial, The Jury Was Presented With Two Duplicate Aggravating Circumstances That Involved The Same Alleged Indivisible Act 24

Page

B. The Missouri Supreme Court Should Have Reviewed These Duplicate Aggravating Circumstances Under The Standard Of Review Appropriate For "Weighing" Jurisdictions 26

1. The Distinction Between Weighing And Non-Weighing Schemes Is Of "Critical Importance" 26

2. Missouri Requires Jurors To "Weigh" Aggravating Circumstances During The Sentencing Phase 27

CONCLUSION 29

TABLE OF APPENDICES

Appendix A	Denial of Appellant's Motion for Rehearing by the Missouri Supreme Court	1a
Appendix B	Opinion of the Missouri Supreme Court	4a
Appendix C	Findings of Fact, Conclusions of Law, Order and Judgment of the Missouri Circuit Court for the Twenty-Second Judicial Circuit	62a
Appendix D	Sentence and Judgment and Warrant of Execution From the Circuit Court of the City of St. Louis, State of Missouri	113a
Appendix E	Selected Amendments to the Constitution of the United States of America	122a
Appendix F	Missouri Death Penalty Statute, Mo. R.S. § 565.030 (1997)	124a
Appendix G	Transcript of Voir Dire of Virto Doss	127a
Appendix H	Penalty Phase Jury Instructions # 36, 38, 39, 41, 43 and 44	151a

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Texas, 448 U.S. 38 (1980) 21-23

Anderson v. Smith, 751 F.2d 96 (2d Cir. 1984) 12-13

Arizona v. Fulminante, 499 U.S. 279 (1991) 16

Brewer v. Williams, 430 U.S. 387 (1977) 15

Chapman v. California, 386 U.S. 18 (1967) 17

Clemons v. Mississippi, 494 U.S. 738 (1990) 27, 28

Connecticut v. Barrett, 479 U.S. 523 (1987) 12

Cook v. State, 369 So.2d 1251 (Ala. 1978) 25-26

Davis v. Executive Dir. of Dep't of Corrections, 100 F.3d 750 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1703 (1997) 28

Davis v. Georgia, 429 U.S. 122 (1976) 22

Edwards v. Arizona, 451 U.S. 477 (1981) 15

Espinoza v. Florida, 505 U.S. 1079 (1992) 27

Gray v. Mississippi, 481 U.S. 648 (1987) 21-23

Page(s)

Gregg v. Georgia, 428 U.S. 153 (1976) 27

Michigan v. Mosley, 423 U.S. 96 (1975) 11

Miranda v. Arizona, 384 U.S. 436 (1966) 11-15

Morgan v. Illinois, 504 U.S. 719 (1992) 23

North Carolina v. Butler, 441
U.S. 369 (1979) 15

People v. Bigelow, 37 Cal.3d 731,
209 Cal. Rptr. 328, 691 P.2d
994 (1984) 25

People v. Marshall, 41 Cal. App. 3d 129 (1974) 12

Provence v. State, 337 So.2d 783
(Fla. 1976), *cert. denied*,
431 U.S. 969 (1977) 25

Schneider v. Delo, 890 F. Supp. 791
(E.D. Mo. 1995), *aff'd*, 85 F.3d 335
(8th Cir.), *cert. denied*,
117 S. Ct. 530 (1996) 27-28

Simpkins v. State, 486 S.E.2d 833 (Ga. 1997) 25

Smith v. Balkcom, 660 F.2d 573
(5th Cir. 1981), *modified*,
671 F.2d 858, *cert. denied*,
459 U.S. 882 (1982) 23

Page(s)

Smith v. Endell, 860 F.2d 1528 (9th Cir. 1988), *cert. denied*, 498 U.S. 981 (1990) 13

Smith v. Illinois, 469 U.S. 91 (1984) 14-15

State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (Neb.), *cert. denied*, 434 U.S. 912 (1977) 25, 26

State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992) 28

Stringer v. Black, 503 U.S. 222 (1992) 26-28

U.S. v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996) 26

U.S. v. McCullah, 87 F.3d 1136 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997) 25

Wainwright v. Witt, 469 U.S. 412 (1985) 21-23

Wiley v. State, 484 So.2d 339 (Miss.), *cert. denied*, 479 U.S. 906 (1986) 25

Willie v. State, 585 So.2d 660 (Miss. 1991) 25

Witherspoon v. Illinois, 391 U.S. 510 (1968) 21, 22, 23

Zant v. Stephens, 462 U.S. 862 (1983) 27

Page(s)

Constitutional Provisions

U.S. Const. amend. V 12

U.S. Const. amend. VI 17, 22

U.S. Const. amend. VIII 24-28

U.S. Const. amend. XIV 22

Statutes

Mo. Rev. Stat. § 558.011 10

Mo. Rev. Stat. § 565.020 10

Mo. Rev. Stat. § 565.021 10

Mo. Rev. Stat. § 565.030(4) 28

Other Authority

Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 Tex. L. Rev. 441 (1994) 28

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

REGINALD CLEMONS

Petitioner,

v.

STATE OF MISSOURI

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Reginald Clemons, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Missouri in the case styled *Missouri v. Reginald Clemons*, 946 S.W.2d 206 (Mo. banc 1997).

OPINION BELOW

The Missouri Supreme Court's opinion affirming petitioner's conviction on two counts of first degree murder and sentence of death is reported at 946 S.W.2d 206 (Mo. banc 1997), and may be found in the Appendix at pages 4a-61a. The rulings of the trial

court, relevant portions of which may be found in the Appendix, are not reported.

JURISDICTION

The Missouri Supreme Court entered its judgment on May 27, 1997, and denied a timely Motion for Rehearing on June 17, 1997. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution: The Fifth Amendment, the Sixth Amendment, the Eighth Amendment, and the Fourteenth Amendment, all of which are set forth in the Appendix at 122a-123a.

This case also involves the Missouri Death Penalty Statute, Mo. Rev. Stat. §565.030(4), which is set forth in the Appendix at 124a-126a.

STATEMENT OF THE CASE

Petitioner respectfully suggests that this case presents three issues worthy of certiorari. First, petitioner's Fifth Amendment right to remain silent was violated when the police continued to interrogate him after he answered "No, sir" to the question of whether he wished to make a statement. Second, the Missouri Supreme Court erred in affirming the trial court's *sua sponte* striking for cause of a juror who expressed reservations about the death penalty, but who unequivocally affirmed that he could apply the death penalty in appropriate circumstances. Finally, the Missouri courts erred in double-counting the single act of robbery as two separate aggravating circumstances weighing in favor of the death

penalty, thus violating petitioner's rights under the Eighth Amendment.

Factual Background

The Arrest and Confession of State's Witness Thomas Cummins

The Chain of Rocks Bridge in St. Louis, Missouri, is an abandoned highway bridge spanning the Mississippi River between Illinois and Missouri. Young people in the St. Louis area frequently gathered there, trespassing on its paved deck, painting graffiti, and climbing down through manholes to reach its substructure and piers.

In the early morning hours of April 5, 1991, Thomas Cummins[1] stepped out onto the roadway from the entrance to the Chain of Rocks water works, just south of the Chain of Rocks Bridge. Tr. at 1710-11.[2] He stopped a passing truck and asked the driver to call the police, saying "They raped my cousins and threw me off the bridge." Tr. at 1597, 1712-13.

Thomas identified himself to the police as a nineteen-year-old fire-fighter from Gaithersburg, Maryland, who was visiting his grandfather's family in St. Louis. Tr. at 1663, 1667-68. Around midnight on April 4, Thomas had left the rest of his family to meet with his cousins, Julie and Robin Kerry, and visit the Chain of Rocks Bridge. Tr. at 1667.

---

1. To avoid confusion between the similar surnames of State's witness Thomas Cummins and petitioner Reginald Clemons, Thomas Cummins will be referred to hereafter by his first name (*i.e.*, Thomas).

2. References to "Tr. at __" refer to the trial transcript.

Thomas told the police that while on the bridge he and his cousins had met four other youths, three of whom were black. He claimed that during an encounter with the four youths his cousins had been raped and thereafter pushed off the bridge. Thomas said he had been robbed and then told to jump from the bridge, which he did. Tr. at 1689, 1700. He said that after his leap from the bridge he tried unsuccessfully to rescue Julie Kerry, whom he found struggling in the river below. Tr. at 1706-07. Eventually, he swam to the Missouri shore, where he hailed the passing truck. Tr. at 1712.

The police, however, were skeptical of Thomas's account. They doubted that Thomas could have survived—at least not without serious injury—the 90-foot fall from the bridge into near freezing water with rough surf and a strong current. Tr. at 2225, 2889. Aside from a slight scratch on one cheek, Thomas appeared unharmed. Tr. at 1919.

Thomas was taken from the scene and questioned in a police interrogation room for several hours. Tr. at 1719-20. The questioning by Detective Chris Pappas focused on the details of the alleged attack. Tr. at 1904.

Under continued questioning, Thomas repudiated his earlier statements and gave the police a statement implicating himself in the death of his cousins. He told detectives that he had made a sexual advance toward Julie Kerry and that she had lost her balance and fell into the river; he claimed that Robin Kerry must have jumped into the river to save her sister. Tr. at 2808, 2833. Thomas was then arrested and jailed. Tr. at 2834.

Thomas subsequently testified that the police had beaten and threatened him to obtain a confession. Tr. at 1842, 1907-08.

According to Thomas, Detective Pappas and his colleagues instructed him to sit on his hands while they held him down and beat him, striking repeated blows to the back of his head and chest. Tr. at 1909.

The Arrest and Confession of Petitioner Reginald Clemons

Subsequent to Thomas's arrest, the police found a flashlight on the bridge, which they traced to a sixteen-year-old youth named Antonio Richardson. App. at 5a.[3] The police obtained a statement from Richardson in which he implicated himself and three other local youths: Daniel Winfrey, Marlin Gray and petitioner Reginald Clemons. Tr. at 1294.

On the afternoon of April 7, 1991, two days after Thomas's interrogation, Detective Pappas went to question petitioner Clemons. Clemons was a nineteen-year-old automobile mechanic with no prior criminal record. He lived with his mother and stepfather in suburban St. Louis, outside Pappas's jurisdiction.

Petitioner was taken to the same interview room where Thomas had been held. He was questioned by Detective Pappas. Pappas subsequently testified that during the initial interview Clemons denied any participation in the incident on the bridge. Tr. at 1299.

Petitioner, however, testified that immediately prior to each of his various interrogations he had been beaten by Pappas and

---

3. References to "App. at _____ " refer to the Appendix submitted herewith.

another detective. Tr. at 1414.[4] Petitioner further testified that he ultimately agreed to provide a taped statement to the officers because of the beatings. Tr. at 1415, 1419.

Petitioner's Audiotaped Confession

Several hours after he was first brought to the station, Detectives Pappas and Brauer began an audiotaped interrogation of petitioner.

After introducing himself, Detective Brauer and petitioner on the tape, Detective Pappas read petitioner his *Miranda* rights—including the right to counsel and right to remain silent. Petitioner indicated that he understood the rights "just read" to him. Tr. at 2848.

The State's own transcript of the audiotape then records the following exchange:

> DET. PAPPAS: Okay. At this time, Reginald,—uh—do you wish to waive these constitutional rights and make a statement concerning what happened on the night of April 5th, 1991, on . . . the Chain of Rocks Bridge?
>
> A: *No, sir.*

App. at 19a (emphasis added).

Rather than halting the interrogation of petitioner at that point, however, Pappas pressed on.

---

4. He also testified that he advised the officers that he "wanted [to] get in touch with [my] lawyer," but was told that he was not going to get a lawyer. Tr. at 1414. When asked to make a statement, petitioner again told the officers that he wanted to see a lawyer. Tr. at 1418-19.

DET. PAPPAS: Okay, you do—you don't want to make a statement at this time?

A: I don't want to use the rights.

Q: In other words . . . you're waiving your rights to make a statement . . . . Is that right?

A: Yes.

Q: Okay. So you're waiving your constitutional rights?

A: Okay, sir.

DET. BRAUER: [W]hat it means is that you give up those rights and that you want to talk about the incident. Is that what you want to do? Tell us about the incident?

A: Yes, sir.

DET. BRAUER: Okay. That's what we mean. That's what it means to waive your rights.

DET. PAPPAS: All that means is that you want to waive these rights at this time to make . . . an audio taped statement. That's what we're talking about. Okay. Do you still understand what we're saying? I don't want you to be confused about this.

A: Yes. I want to tell everything that happened up on the bridge.

Q: Okay. So you're wishing to make a statement?

A: Yes.

App. at 20a.

During the subsequent taped interview, petitioner claimed that he had participated—together with Winfrey, Gray and Richardson—in the rape of the Kerrys, but he denied any involvement in the Kerrys' fall from the bridge.

Petitioner's Trial and Conviction

During the trial, the State presented no physical evidence linking petitioner to the events on the bridge.[5] The prosecution's case rested on petitioner's audiotaped confession, the testimony of Thomas, and the testimony of petitioner's former co-defendant, Daniel Winfrey.

The Testimony of Thomas

The charges against Thomas, who had been the first person arrested in the incident, were dropped after the arrest of Richardson, Gray, Winfrey and petitioner.

Thomas could not attribute any specific wrongdoing to petitioner Clemons. He did not know who had removed his wallet. He did not see the Kerrys being assaulted. He could not tell who had pushed his companions from the bridge, nor could he identify the voice that told him to jump. Tr. at 1886-87, 1939.

According to Thomas, he and the Kerrys encountered the four youths at the Illinois end of the bridge. Tr. at 1681. One of the four (but not petitioner Clemons) separated Thomas from his cousins and told Thomas he was going to rob him. Tr. at 1684. Thomas was told to lie face down on the ground and his wallet was taken.

---

5. The body of Robin Kerry was never found. A body identified as that of Julie Kerry was found three weeks after the incident some two hundred miles downriver. Forensic evidence indicated that she had drowned, but was inconclusive as to proof of rape or other acts of violence.

Tr. at 1685. He heard the Kerrys being threatened. Tr. at 1685. Thomas testified that he was then told to climb down a manhole onto a cramped, unlit metal platform beneath the bridge, where he lay down alongside the two Kerry women. Tr. at 1694-94.

From the platform, Thomas testified that he and the Kerrys were directed to stand on the concrete bridge support. Tr. at 1697. At this point, Thomas was aware of the presence of no more than one of the four youths with himself and the Kerrys down on the bridge's substructure. Tr. at 1698.

Thomas then saw "a hand," unidentified, push the Kerrys off the bridge support and into the river. A "voice," unidentified, then ordered him to jump and he complied. Tr. at 1699-1700.

The Testimony of Daniel Winfrey

Daniel Winfrey, the only white person indicted in connection with the death of the Kerrys, entered into a plea agreement and testified against petitioner and the other two defendants.[6] Tr. at 2068-69. In return for his testimony, Winfrey received a sentence that made him eligible for parole in six to eight years.

During petitioner's trial, Winfrey testified that petitioner had participated in the rape of the Kerrys and the robbery of Thomas. Tr. at 2036, 2044. However, as with Thomas, Winfrey did not see who pushed the Kerrys from the bridge. According to Winfrey, the only defendant who descended into the manhole with Thomas and the Kerrys was Antonio Richardson. Tr. at 2108-09.

---

6. Neither Marlin Gray nor Antonio Richardson, who were each tried separately, testified at petitioner's trial. Like petitioner, Gray and Richardson are black. Like petitioner, they each received a sentence of death.

Admission of the Audiotaped Confession

Petitioner's audiotaped confession, in which he admitted participation in the rape, but denied any involvement in pushing the Kerrys from the bridge, was admitted at trial. Tr. at 1301-02.

During his confession, petitioner said that he had believed that if the Kerrys were left on the bridge platform, without their clothes, they would be unable to follow him and his companions after they left the bridge, but that Richardson had gone down to the substructure, and pushed the two women from the bridge support, and had then ordered Thomas to jump. Tr. at 1699-1700.

Petitioner's Conviction

In its closing argument on the guilt phase of the trial, the State conceded that it was Richardson, and not petitioner, who pushed the Kerrys from the bridge.[7] Tr. at 3233. The prosecution also relied heavily on petitioner's confession.

During the penalty phase, the State repeatedly referred to, and quoted from, petitioner's audiotaped statement.

Petitioner was convicted of two counts of first degree murder and sentenced to death.

---

7. Felony murder is not a capital offense in Missouri. *See* Mo. Rev. Stat. §§ 565.021 and 558.011. "Proof that a defendant merely aided another with the purpose of facilitating an intentional killing is not enough to prove first degree murder." App. at 11a.

   To prove the capital offense of first degree murder under Mo. Rev. Stat. § 565.020, the State had to show that the defendant both (1) had a "conscious purpose that the victims be killed" and (2) "cooly reflected" on that purpose.

Decision on Appeal

On appeal, the Missouri Supreme Court affirmed the conviction and death sentence. App. at 115a. Petitioner's execution date has been set for September 19, 1997.

REASONS FOR GRANTING THE PETITION

POINT I.

THE STATE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO REMAIN SILENT

A. When Asked If He Wished To Waive His Rights And Make A Statement, Petitioner Responded "No, sir," And Thus The Police Were Obligated To Cease The Interrogation Immediately

This Court has established a clear procedure that the police must follow when a suspect asserts his *Miranda* rights. After an invocation of the right to remain silent, the police may not renew the interrogation until after a "significant passage of time" and "a fresh set of warnings," and even then the police may not interrogate the suspect about the same topic. *Michigan v. Mosley*, 423 U.S. 96, 106 (1975).

Here, in response to Detective Pappas's question of whether petitioner wished to make a statement, the answer was crystal clear: "No, sir." App. at 19a.

Once petitioner gave that response, Pappas and Brauer were constitutionally compelled to honor his request by terminating the interrogation. *See id.* But the officers here pressed on and questioned petitioner further, repeatedly asking him if he wanted to

make a statement. Petitioner was eventually induced to relinquish the very rights he had invoked just moments before. This is precisely the type of police conduct that the rule in *Mosley* was designed to prevent.

All of the evidence obtained after petitioner responded "No, sir" was taken in violation of his Fifth Amendment rights, and it was reversible error to admit such evidence against him at trial.

1. Petitioner Validly Invoked His *Miranda* Rights Because His Response Of "No, sir" Was Perfectly Clear And Unambiguous

Petitioner validly invoked his *Miranda* rights because his request to remain silent was clear and unambiguous. "No, sir" is not an ambiguous statement. Further interpretation by the police was not necessary.[8] As this Court has held, "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987).

Courts have agreed with the popular intuition that, in this context, "No" means "No." *See, e.g., People v. Marshall*, 41 Cal. App. 3d 129, 134 (1974) (holding that defendant's response of "no" to officer's question as to whether defendant wanted to supplement his story was a "clear invocation" of his right to remain silent, and asking "[i]s there more a defendant must say to invoke his privilege to remain silent than 'No' when asked to explain or clarify or continue the conversation?"); *Anderson v. Smith*, 751 F.2d 96, 98, 104 (2d Cir. 1984) (finding no latent ambiguity in the exchange:

---

8. As Detective Brauer testified, petitioner's response was perfectly audible. Tr. at 1363.

"Q: Do you want to talk to me now? A: No."); *Smith v. Endell*, 860 F.2d 1528, 1531 (9th Cir. 1988) (holding invocation unambiguous where "there was no 'might' or 'maybe' or 'perhaps.'"), *cert. denied*, 498 U.S. 981 (1990). Here, petitioner's refusal to make a statement could not have been any clearer, and thus he validly invoked his rights under *Miranda*.

2. Petitioner's Statements Either Before Or After He Said "No, sir" Cannot Be Used To Cast Doubt On His Assertion Of His *Miranda* Rights

The Missouri Supreme Court found that petitioner had waived his *Miranda* rights based upon statements he had made both prior to, and after, his reply of "No, sir." But such statements may not be used to interpret away petitioner's clear invocation.

a. The events preceding the audiotaped interrogation did not render petitioner's response of "No, sir" ambiguous.

The Missouri Supreme Court ruled that petitioner's reply of "No, sir" was "an ambiguous, equivocal statement of his intent that required clarification." App. at 21a. The court based its ruling entirely on its factual finding that petitioner "had been freely speaking with police for the past two hours, had already confessed, and had agreed to make a tape recorded statement before the detective began to record the confession. . . ." *Id.*

Yet a defendant is entitled to invoke his rights under *Miranda* at *any stage* of the interrogation, and the police are obligated to

honor the invocation.[9] *See Miranda v. Arizona*, 384 U.S. 436, 473 (1966) ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."). The fact that a defendant initially speaks to the police does not in any way preclude that defendant from asserting the right to remain silent at a later time. *Id.*

Here, petitioner chose to assert his rights when the police began to audiotape the interrogation. His choice to invoke his rights at the time that the police were beginning a more formal and more carefully documented interrogation is not surprising. Indeed, the fact that the police felt obliged to read him his rights on audiotape indicates the formal nature of the interrogation. And petitioner's assertion of his *Miranda* rights, once on audiotape, was unequivocal.

b. Petitioner's post-invocation statements cannot be used to establish a waiver of his Miranda rights.

The Missouri Supreme Court improperly relied on the detectives' post-invocation questioning of petitioner in ruling that his initial refusal to speak had been an "ambiguous, equivocal" one.

But once a defendant validly invokes his *Miranda* rights, any statements that follow the invocation cannot be used to suggest that the invocation was ambiguous. *See Smith v. Illinois*, 469 U.S. 91, 92 (1984) ("[P]ostrequest responses to further interrogation may not

---

9. The Missouri courts improperly confused the issue of whether petitioner had ever invoked his *Miranda* rights with the question of whether he had waived them. App. at 20a-21a. However, as this Court has noted, "[i]nvocation and waiver are entirely distinct inquiries." *Smith v. Illinois*, 469 U.S. 91, 98 (1984).

be used to cast retrospective doubt on the clarity of [the] initial request itself"). Thus, the police may not use the fruits of their disregard for a defendant's assertion of his rights to retrospectively throw doubt on that assertion.

Moreover, this Court has clearly held that a valid *waiver* of *Miranda* rights "cannot be established by showing only that [the defendant] responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Any alternate rule would permit interrogators to benefit from their violation of a defendant's *Miranda* rights in virtually every instance.

Under these circumstances, the State cannot meet its heavy burden of showing that petitioner waived his rights. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) ("the courts must presume that a defendant did not waive his rights; the prosecution's burden is great . . . ."); *see also Brewer v. Williams*, 430 U.S. 387, 404 (1977) (observing that the Court will "indulge in every reasonable presumption against waiver."). Petitioner validly asserted his *Miranda* rights, and the subsequent efforts of the police to induce him to relinquish them clearly violated his rights under the Fifth Amendment.

B. The Admission Of Petitioner's Statements In Violation Of His *Miranda* Rights Was Not Harmless Error

The admission of statements made by petitioner after he exercised his right to remain silent severely prejudiced his defense and cannot be considered harmless error.

In the context of confessions taken in violation of a defendant's Fifth Amendment rights, this Court has established an exacting standard: the State must prove that the unlawfully obtained statements were harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 297 (1991). Noting that "[a] confession is like no other evidence," this Court has warned that "extreme caution" must be taken in evaluating whether the admission of an unlawfully-obtained confession was harmless. *Id.* at 295. This is because an unlawfully-obtained confession is both inherently untrustworthy, and because of the "profound impact" that confessions have upon juries. *Id.* at 296.

Here, the admission of the audiotaped statement that petitioner made to the police was far from harmless. The statement included a confession to involvement in the rape of the Kerry cousins. In this case, as in *Fulminante*, no physical evidence linked petitioner to the crime. *Id.* at 297-98. Further, as in *Fulminante*, the confession tended to bolster the testimony of the State's witnesses, lending them credibility when viewed against the context of the unlawful confession. *Id.* at 300. During both the guilt and penalty phases, the prosecution repeatedly referred to, and quoted from, the confession.

This case presents an even stronger example of prejudicial error than *Fulminante*. Thomas, the Kerrys' companion, was totally unable to link petitioner to any specific act of wrongdoing. Petitioner's co-defendant, Daniel Winfrey, who had exchanged his testimony for leniency, was on the upper roadway of the bridge when the Kerrys were pushed off the lower substructure. No witness actually saw who pushed the Kerrys off the bridge. Most importantly, the prosecution in its closing statement conceded that petitioner did not push the Kerrys from the bridge. Tr. at 3233.

Under such circumstances, the admission of the confession was clearly not harmless error, and requires reversal. The prosecution simply cannot sustain its burden of proving, beyond a reasonable doubt, that there was no "reasonable possibility" that the unlawful confession contributed to the verdict. *Chapman v. California*, 386 U.S. 18, 23 (1967).

POINT II.

THE MISSOURI SUPREME COURT FAILED TO FOLLOW THE REQUIREMENTS SET FORTH IN *GRAY V. MISSISSIPPI*, 481 U.S. 648 (1987), WHEN IT PERMITTED VENIREPERSON VIRTO DOSS TO BE STRICKEN FOR CAUSE

Venireperson Virto Doss stated on several occasions during his *voir dire* that his reservations about the death penalty *would not* preclude him from handing down a sentence of death if the facts warranted it. Nevertheless, the trial court, *sua sponte*, dismissed Doss for cause. As explained below, such action was in direct violation of petitioner's rights under the Sixth Amendment to the Constitution.

A. Venireperson Virto Doss, After Initially Indicating A Conscientious Objection To The Death Penalty, Ultimately And Clearly Stated That He Could Set Aside His Personal Views And Vote For A Death Sentence If The Facts Warranted It

During jury selection, venireperson Virto Doss was asked several questions by the prosecutor in an effort to determine whether he would be capable of imposing the death penalty with regard to an accomplice who did not personally commit the

physical act of murder.[10] At first, Doss stated that he could not vote for the death penalty based on his long-held religious beliefs. App. at 131a. Upon further questioning by the prosecutor, however, Doss unambiguously stated that he could set aside his opposition and vote for a death sentence if the facts warranted it:

[STATE]: Do you feel that this belief is so much a part of you, so strong that you could not—that there is nothing I could show you in this case in the form of witnesses, or physical exhibits, or that would let you set that belief aside temporarily for purposes of this case, and let you—enable you to vote for the death penalty?

Now, is it that strong that you could not set it aside for this case?

DOSS: Not after you present me with the facts, I can.

* * * *

[STATE]: *The question is, is your religious belief such that* if you went down to the jury room and you're sitting around talking with the other people, and you say, "I can't—I know I said there was a possibility, but really my belief is such that I can't vote to have another man executed." You know. That your belief is so strong that the bottom line *when you get done discussing and making up your mind about it, you're going to say, "My*

---

10. The entire *voir dire* of Mr. Doss can be found in the Appendix at 127a-150a.

principles, my religious beliefs just won't let me do it"?

DOSS: *No.*

App. at 132a (emphasis added).

Doss was then asked whether proof beyond a reasonable doubt, described by the prosecutor as proof that left him firmly convinced, would be sufficient for Doss to vote to impose the death penalty. App. at 132a. Doss answered—twice—that it would be sufficient. *Id.* Finally, when asked whether he could impose the death penalty if petitioner had not actually pushed the Kerrys off the bridge, Doss initially said no. *Id.* But immediately thereafter, in response to the prosecutor's follow-up questions, Doss said that he could consider the death penalty even if petitioner had not himself pushed anyone off the bridge:

[STATE]: Okay. Do you think, given your belief and given what we have talked about so far, do you think there is anything I can really show you that would let you vote for the death penalty, even though I could never show you that he was the one who finally pushed them off? *Is there anything else you think I could show you that would change your mind about the fact that I could not show you he pushed them off, but he did everything else?*

DOSS: *Yes.*

[STATE]: You think there is something I might be able to show you that would change your mind about voting for the death penalty if I didn't show you he pushed them

over, *you could still vote for the death penalty, even though I could not show you he pushed them off?*

DOSS: *Yes.*

App. at 133a (emphasis added).

Shortly thereafter, at sidebar, the trial court struck Doss for cause. In so doing, the court stated:

THE COURT: My recollection, or my notes, he stated yes, that with respect to acting with another, he could not consider the death penalty. And I don't think he was rehabilitated on that today. So I'll grant the State's motion to strike Juror No. 948, Virto Doss for cause.

App. at 147a.

A careful review of the record reveals that the State *never moved* to strike Doss for cause. The trial court raised the issue of striking Doss for cause entirely on its own. Defense counsel timely objected to the court's decision to strike Doss for cause. App. at 148a.

In his appeal to the Missouri Supreme Court, petitioner moved, *inter alia*, for a reversal of his death sentence, and the verdict of guilty, on the grounds that venireperson Doss was improperly excluded for cause by the trial court. In its opinion denying this request, the Missouri Supreme Court concluded that Doss's "equivocal and shifting responses" during voir dire "provid[ed] a sufficient rationale for the trial court's decision to sustain the State's motion," App. at 36a, again misinterpreting the record and believing that the State had moved to dismiss him.

B. Under This Court's Holding In *Gray v. Mississippi*, 481 U.S. 648 (1987), The Trial Court Was Prohibited From Excluding Venireperson Doss For Cause

It is black-letter constitutional law that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). In considering "for cause" challenges in cases that involve the possibility of capital punishment, this Court has concluded: "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). A "for cause" challenge is justified only where a juror demonstrates an intransigent refusal to impose the sanction. *Id.*; *Adams*, 448 U.S. at 45-46.

Gray v. Mississippi, 481 U.S. 648 (1987), a case which bears remarkable similarities to the case at bar, reaffirmed these principles. After the State had exhausted all of its peremptory challenges, a prospective juror, Mrs. H.C. Bounds, stated during voir dire that although she was opposed to the death penalty she could vote to impose it in appropriate circumstances. *Id.* at 653-54. Arguing that the Court improperly refused to remove previous jurors for cause, the State asked the trial court to restore one of its peremptory challenges so that it might remove Mrs. Bounds. The trial court instead excused Mrs. Bounds for cause. *Id.* at 655-56.

The jury convicted the defendant of first degree murder and sentenced him to death.

This Court agreed with a unanimous Mississippi Supreme Court below that Mrs. Bounds was "clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria." *Id.* at 659 (quoting *Witherspoon*, 391 U.S. at 523). Her equivocation on the death penalty questions did not indicate views that would prevent or substantially impair her performance of her duties as a juror because she ultimately stated a willingness to impose a capital sentence in an appropriate case. *Gray*, 481 U.S. at 658-59.[11]

The present case is on all fours with *Gray*. Both cases involve a prospective juror who indicated an initial reluctance to impose the death penalty. Similarly, in both cases, that juror then clearly stated that he/she could vote to impose the death penalty in appropriate circumstances. Just as Mrs. Bounds's initial equivocation during voir dire was not enough to justify striking her "for cause," so too, Doss's initial equivocation is not sufficient to find him unqualified to serve as a juror. In the end, both jurors clearly stated that they could impose the death penalty if the facts warranted it.

---

11. This Court further held that the trial court's error was not subject to harmless error analysis. The erroneous striking of Mrs. Bounds had violated Gray's right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments and therefore required the automatic reversal of his death sentence. *Id.* at 668. "The nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless." *Id.*, at 665. The Court thus explicitly declined to overrule its prior opinion in *Davis v. Georgia*, 429 U.S. 122, 123 (1976) ("if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.").

In its extremely brief treatment of this issue below, the Missouri Supreme Court, never citing *Gray*, simply stated:

> Doss's equivocal and shifting responses to questions focusing on his ability to impose the death penalty provide a sufficient rationale for the trial court's decision to sustain the state's motion. In light of Doss's conflicting testimony, the trial court did [not] abuse its discretion in striking Doss for cause.

App. at 36a.

As *Gray* makes clear, however, Doss's alleged "equivocation" is not the issue. What is relevant is that Doss, upon reflection, clearly and unequivocally stated that he could vote for a death sentence. Consequently, *Gray* requires a reversal of petitioner's death sentence.

Indeed, not only did the Missouri Supreme Court completely ignore *Gray*, but its reasoning totally disregards the *Adams-Witt* standard established by this Court. A juror, such as Doss, who clearly and repeatedly states his willingness to put aside his personal reservations and impose the death penalty in appropriate circumstances is *exactly* the type of juror for whom a "for cause" challenge may not be used. *See Adams*, 448 U.S. at 48 ("if prospective jurors are barred from service . . . on 'any broader basis' than their ability to follow the law or abide by their oaths, the death sentence can not be carried out.") (quoting *Witherspoon*, 391 U.S. at 522 n.21); *Morgan v. Illinois*, 504 U.S. 719, 734 n.7 (1992) ("'All veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case.'") (quoting *Smith v. Balkcom*, 660 F.2d 573, 578 (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982)).

POINT III.

THE USE OF BOTH A PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE AND A ROBBERY AGGRAVATING CIRCUMSTANCE FOR A SINGLE ACT RESULTED IN "DOUBLE-COUNTING" IN VIOLATION OF THE EIGHTH AMENDMENT

A. During The Penalty Phase Of Petitioner's Trial, The Jury Was Presented With Two Duplicate Aggravating Circumstances That Involved The Same Alleged Indivisible Act

Among the instructions submitted by the State and ultimately given to the jury during the penalty phase of the trial were the following:

> In determining the punishment to be assessed under Count I against the defendant for the murder of [victim], you must first unanimously determine whether one or more of the following aggravating circumstances exist:
>
> * * * *
>
> 5. Whether the defendant committed the murder of [victim] while the defendant was knowingly aiding or encouraging Marlin Gray and Antonio Richardson *in the perpetration or attempt to perpetrate robbery.*
>
> 6. Whether the defendant committed the murder of [victim] for the purpose of the defendant and Marlin Gray and Antonio Richardson, *receiving money or any other thing of monetary value* from Thomas Cummins.

App. at 152a-153a. (emphasis added).

Submitting these two duplicate aggravating circumstances, which involve the same alleged conduct of the petitioner, violated petitioner's Eighth Amendment rights. "A single, legally indivisible act of the defendant may rationally aggravate a murder but once." *Wiley v. State*, 484 So.2d 339, 358 (Miss.) (Robertson, J., concurring), *cert. denied*, 479 U.S. 906 (1986); *see also State v. Rust*, 197 Neb. 528, 538, 250 N.W.2d 867, 874 (Neb.) ("[I]t is not reasonable . . . to make the same identical facts constitute two aggravating circumstances."), *cert. denied*, 434 U.S. 912 (1977). The purpose of aggravating circumstances—to rationally narrow the application of capital punishment to those convicted murderers truly deserving it—is thwarted by allowing "double-counting" of a single aspect of the crime or single characteristic of the defendant. To ensure that the death penalty is not arbitrarily applied, a court should allow a jury to consider an aggravating circumstance only if it relies on different operative facts from any other aggravating circumstances considered.

Indeed, "[t]he vast majority of courts that have considered this issue have concluded that . . . it is improper to charge both murder committed during a robbery and murder for pecuniary gain as statutory aggravating circumstances." *Simpkins v. State*, 486 S.E.2d 833, 838 (Ga. 1997) (Fletcher, J. concurring); *accord Provence v. State*, 337 So.2d 783, 786 (Fla. 1976) (finding that "[defendant's] pecuniary motive at the time of the murder constitutes only one [aggravating] factor"), *cert. denied*, 431 U.S. 969 (1977); *see also U.S. v. McCullah*, 87 F.3d 1136, 1138 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997); *Willie v. State*, 585 So.2d 660, 680-81 (Miss. 1991) (same); *People v. Bigelow*, 37 Cal.3d 731, 209 Cal. Rptr. 328, 340, 691 P.2d 994, 1006 (1984); *Cook v. State*, 369

So.2d 1251, 1256 (Ala. 1978); *State v. Rust*, 197 Neb. at 537, 250 N.W.2d at 873.

Where, as here, the aggravating circumstances at issue are given to a jury in a "weighing" sentencing scheme, the likelihood of constitutional error is even greater. *U.S. v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996) ("Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally."); *cf. Stringer v. Black*, 503 U.S. 222, 230 (1992) ("That [a state] is a weighing State only gives emphasis to the requirement that aggravating factors be defined with some degree of precision.").

On appeal to the Missouri Supreme Court, petitioner argued that these duplicate aggravating circumstances were constitutionally infirm because they "double-counted" in violation of the Eighth Amendment. In its opinion, however, the Missouri Supreme Court—ignoring the authorities cited by petitioner—rejected petitioner's claim, stating only that "[s]imilar arguments have been presented to and rejected by this Court." App. at 55a.

B. The Missouri Supreme Court Should Have Reviewed These Duplicate Aggravating Circumstances Under The Standard Of Review Appropriate For "Weighing" Jurisdictions

1. The Distinction Between Weighing And Non-Weighing Schemes Is Of "Critical Importance"

"[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and

limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, J.J.).

In scrutinizing the validity of death sentences, this Court has drawn a distinction between "non-weighing" and "weighing" jurisdictions. The distinction is acknowledged to be one of "critical importance" to the accused. *Stringer*, 503 U.S. at 231.

In "non-weighing" jurisdictions, an appellate court may uphold the death sentence even when an unconstitutional aggravating factor has been submitted to the jury as long as at least one valid aggravating factor remains. *Zant v. Stephens*, 462 U.S. 862, 885-86 (1983); *Stringer*, 503 U.S. at 231.

By contrast, in "weighing" jurisdictions, the use of an invalid aggravating circumstance violates the Eighth Amendment. In such cases, an appellate court must either (1) independently reweigh the aggravating and mitigating factors, omitting the unconstitutional one, or (2) conduct a harmless error analysis. *See Clemons v. Mississippi*, 494 U.S. 738, 750-52 (1990). Thus, the determination of whether the erroneous aggravating circumstance has been considered in a "weighing" or "non-weighing" jurisdiction can literally mean the difference between life and death for a defendant. *See Espinoza v. Florida*, 505 U.S. 1079, 1080-81 (1992).

2. Missouri Requires Jurors To "Weigh" Aggravating Circumstances During The Sentencing Phase

Missouri is a weighing jurisdiction. *See, e.g., Schneider v. Delo*, 890 F. Supp. 791, 828 n.11 (E.D. Mo. 1995) ("Missouri is a 'weighing' state because the sentencer must determine that sufficient aggravating circumstances . . . exist to outweigh any

mitigating circumstances in order to impose the death penalty"), *aff'd*, 85 F.3d 335 (8th Cir.), *cert. denied*, 117 S. Ct. 530 (1996); State v. Whitfield, 837 S.W.2d 503, 511-12 (Mo. banc 1992); Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 Tex. L. Rev. 441, 462 (1994) (characterizing Missouri as a weighing state).

Indeed, the "weighing" process is integral to Missouri's death penalty statute.[12] After unanimously agreeing that at least one statutory aggravating circumstance exists that warrants the death penalty, the jury must consider evidence in mitigation and determine whether such evidence is "sufficient to outweigh the evidence in aggravation." Mo. Rev. Stat. § 565.030(4)(1-3). This weighing of evidence is identical to the process employed by juries in other weighing jurisdictions. *See, e.g., Stringer*, 503 U.S. at 229.

Because Missouri is properly considered a "weighing" jurisdiction, the double-counting of the robbery constituted an Eighth Amendment violation requiring the proper *Clemons* standard of review. *See Stringer*, 503 U.S. at 232 ("when the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."); *Davis v. Executive Dir. of Dep't of Corrections*, 100 F.3d 750, 768 (10th Cir. 1996) ("Because weighing thus performs a critical function in the jury's sentencing scheme, we apply, where appropriate, the *Clemons* harmless error analysis."), *cert. denied*, 117 S. Ct. 1703 (1997).

---

12. The Missouri Death Penalty Statute is set out in full in the Appendix at 124a-126a.

For the above reasons, petitioner's rights under the Eighth Amendment were clearly violated.

CONCLUSION

The decision of the Missouri Supreme Court is at odds with the law of this Court on each of the issues as to which petitioner seeks certiorari. Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

September 12, 1997

Respectfully submitted,

/s/ JAMES J. HAGAN
JAMES J. HAGAN
Counsel of Record
Edward D. Johnson
Glenn S. Leon
Jeffrey A. Simes

SIMPSON THACHER & BARTLETT
(a partnership which includes
professional corporations)
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000

Attorneys for Reginald Clemons

Appendix A

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
CLERK

TELEPHONE
(573) 751-4144

June 17, 1997

Mr. Ian J. Yankwitt
425 Lexington Avenue
New York, NY 10017

In re: State of Missouri vs. Reginald Clemons
Missouri Supreme Court No. 75833

Dear Mr. Yankwitt:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled. Execution set for September 19, 1997."

White, J., not sitting.

Yours very truly,

THOMAS F. SIMON

/s/ Christina S. Vinson
Christina S. Vinson
Deputy Clerk, Court en Banc

cc: Missouri Attorney General
Mr. Mark G. Arnold
Mr. John J. Kenney
Mr. David E. Massengill

No. 75833
Circuit Court of St. Louis City No. 911-1758B

IN THE

Supreme Court of Missouri

MAY TERM, 1997

STATE OF MISSOURI,

Respondent,

vs.

REGINALD CLEMONS,

Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the Court that the sentence pronounced against the said Reginald Clemons appellant herein, by the said Circuit Court of St. Louis City

_____ *be in all things executed on* _Friday_ *the* _19th_ *day of* _September_ *19* _97_.

(Opinion filed.)

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the _May_ *Session thereof, 19* _97_*, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this _27_ *day of* _May_ *19* _97_.

_____ Clerk

_____ D.C.

Appendix B

SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI,	)	
	)	
RESPONDENT,	)	
	)	
	)	
vs.	)	No. 75833
	)	
REGINALD CLEMONS,	)	
	)	
APPELLANT.	)	

APPEALS FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
THE HONORABLE EDWARD PEEK, JUDGE

Because of his active participation in the drowning deaths of Julie and Robin Kerry, the jury found Reginald Clemons guilty of two counts of murder in the first degree and recommended the death sentence. The trial court imposed the death sentence. Appellant appeals from this verdict and sentence, as well as from the overruling of his timely-filed rule 29.15 motion. We have jurisdiction, Mo. Const. article V, section 3, and affirm in all respects.

I.

We review the facts in the light most favorable to the verdict. *State v. Copeland,* 928 S.W.2d 828, 834 (Mo. 1996). The Chain of Rocks Bridge is a highway bridge over the Mississippi River that formerly permitted traffic to travel between Illinois and Missouri before authorities closed the bridge to vehicular traffic. Julie and Robin Kerry arranged to take their visiting cousin, Thomas Cummins, to the bridge to show him a graffiti poem they had painted there several years earlier. On April 4, 1991, at approximately 11:25 p.m., the two sisters and Cummins went to the bridge.

Earlier that evening, appellant, Reginald Clemons, along with Marlin Gray, Daniel Winfrey, and appellant's cousin, Antonio Richardson, met at a mutual friend's home. They drank beer and smoked marijuana. Gray suggested that they go to the Chain of Rocks Bridge. About 11:00 p.m., appellant, Richardson, Gray and Winfrey drove in two separate cars to the bridge. Parking near the Missouri end of the bridge, the foursome went through a hole in a fence, over a pile of rocks blocking the bridge entrance to vehicles, and onto the bridge deck. They attempted to smoke a joint of marijuana, but found the marijuana too wet to light. The group walked back toward their cars. They left behind a long metal flashlight that Richardson had brought to the bridge.

The Kerry sisters and Cummins arrived at the bridge sometime after appellant and his friends. The Kerrys and Cummins made their way onto the bridge deck and walked toward the Illinois end of the bridge. They encountered appellant and his companions, who were headed back toward the Missouri side. The two groups chatted

briefly. One of the Kerry sisters gave Winfrey a cigarette. Gray showed the Kerrys and Cummins how to climb over the bridge railing and come back up through a manhole in the bridge deck. He told Cummins that the manhole was "a good place to be alone, and take your woman." The two groups parted, heading in opposite directions. Cummins and the Kerry sisters stopped to look at the graffiti poem and then continued walking toward Illinois.

In the meantime, appellant and his friends had returned to the Missouri end of the bridge. As they lingered there, appellant suggested to his companions, "Let's rob them." Gray replied, "Yeah, I feel like hurting somebody." Richardson suggested they rape the girls. Appellant agreed. The foursome walked back toward the Illinois end of the bridge. As they walked, Winfrey saw Gray talk to appellant, after which Gray came to Winfrey and handed him a condom. Winfrey put the condom in his pocket and stated that he "wasn't going to do it." Appellant grabbed Winfrey, pushed him toward the rail of the bridge, and threatened him until Winfrey agreed to "do it."

The foursome caught up with the Kerry sisters and Cummins at the Illinois end of the bridge. Cummins and the Kerry sisters started back toward Missouri. The four men followed, then formed a cordon around their victims. Appellant and Richardson walked ahead of the Kerrys and Cummins. Gray and Winfrey walked behind.

After they passed the curve in the bridge, Gray grabbed Cummins by the arm, walked him back a short distance, and told him, "This is a robbery." Gray told Cummins to lie down on the

ground. Cummins complied. Cummins heard the Kerry sisters scream for help as appellant and Richardson grabbed them. Appellant pushed one of the sisters toward Winfrey and order him to hold her. Gray told Cummins he would kill him if he looked. Cummins heard one of the assailants say to Julie, "You stupid bitch, do you want to die? I'll throw you off this bridge if you don't stop fighting."

While Winfrey restrained one of the Kerry sisters, Richardson held the other sister down. Appellant ripped the clothes from her and raped her. Richardson and appellant then traded places, and Richardson raped the woman. Gray then told Winfrey to watch Cummins, while Gray and appellant alternately raped the other Kerry sister. Appellant threw the women's clothes over the side of the bridge. Richardson took the first sister to a manhole further down the bridge toward Missouri and forced her to climb down to the metal platform below. Richardson followed her down the manhole.

When Gray finished raping the other Kerry sister, he asked where Richardson had gone. Winfrey said "he went down that way" and pointed toward the Missouri end of the bridge. Winfrey did not tell Gray that Richardson had gone down the manhole. Gray headed down the bridge past the manhole.

In the meantime, appellant forced the other Kerry sister down the manhole with Richardson and the first sister. Appellant returned to Cummins, who was still lying on the ground, took his wallet, some money, a wristwatch, and some keys. When appellant discovered Cummins's firefighter badge in the wallet, he

became concerned that Cummins might be a police officer. Appellant threw something—presumably the badge—off the bridge and put the wallet back in Cummins's pocket. Cummins heard appellant and Winfrey discuss whether Cummins should live or die. Someone told Cummins that he had never had the pleasure of "popping" someone. Appellant then yanked Cummins up by the coat collar, warned him not to look, and walked him to the manhole below which Richardson waited with the Kerry sisters. Appellant ordered Cummins to lie down on the bridge again and pulled his coat over his head. Cummins heard someone say, "You're going to die." Appellant then took Cummins and forced him into the manhole. As appellant started down the manhole, he asked Winfrey where Gray had gone and told Winfrey to "go get him." Winfrey left to find Gray.

On the metal platform under the bridge, Cummins laid down next to Julie and Robin Kerry. Either appellant or Richardson ordered them to get up and go to their left, to the concrete pier below the platform. As Robin Kerry stepped down, she grabbed Cummins's arm; either appellant or Richardson ordered them not to touch each other. When the three of them reached the pier, Julie, then Robin, were pushed off the bridge into the river below. Cummins was ordered to jump. He did. When Cummins surfaced after his seventy-foot fall, he saw Julie nearby in the water, and called for her to swim. Fighting the current and rough water, Julie grabbed Cummins, dragging them both below the surface. Cummins broke free. Julie did not reappear. Cummins eventually reached a steep riverbank and came ashore by a wooded area near the Chain of Rocks waterworks. Authorities recovered

Julie's body from the river near Caruthersville, Missouri, about three weeks later. Robin's body is still missing.

Back on the bridge, Winfrey had walked all the way to the Missouri end of the bridge before he found Gray. He and Gray were returning to the bridge when they met appellant and Richardson. Appellant said, "Let's go, we threw them off." The four got into their cars and drove to a gas station, where they bought food, cigarettes and gas. They then drove to a place referred to as "The Rock," a cliff overlooking the river. The four climbed to the top, and as they sat, appellant and Gray remarked that the victims "would never make it to shore." Gray said that Richardson "was brave for doing that." Gray also told Winfrey that "should have got some of the pussy." As they returned to their cars, appellant said, "Now if anybody said [sic] anything, I'm going to kill him."

Cummins called the police. In the course of their investigation of the bridge scene, police discovered the long flashlight that Richardson had left behind. The police traced the flashlight, which had been reported stolen, to Richardson and brought him in for questioning. Appellant's name surfaced during the interview with Richardson and, on April 7, 1991, detectives met appellant at his home. They asked him to accompany them to police headquarters to discuss the case. Appellant, who was not under arrest, freely accompanied the detectives. At police headquarters, appellant was informed of the constitutional rights protected by the warnings required under *Miranda v. Arizona,* 384 U.S. 436 (1966), waived them, and consented to talk to the police. Appellant confessed to

the rapes and admitted that the Kerry sisters and Cummins were forced from the bridge. After the interview, police arrested appellant.

II.

A.

SUFFICIENCY OF THE EVIDENCE

Appellant argues that the trial court erred in submitting the charge of first degree murder to the jury. He claims there was no evidence from which the jury could find that appellant deliberated prior to the murders of Julie and Robin Kerry.

When reviewing a challenge to the sufficiency of the evidence, the test is whether the state presented sufficient evidence that a reasonable juror could find the defendant guilty beyond a reasonable doubt. *State v. Brown,* 902 S.W.2d 278, 288 (Mo. banc 1995). Deliberation may be inferred from any circumstances that indicate "cool reflection for any length of time no matter how brief." *Id.* The evidence and inferences for the evidence were viewed in the light most favorable to the verdict. *State v. Storey,* 901 S.W.2d 885, 895 (Mo. banc 1995). Evidence and any inferences therefrom that do not support a finding of guilt are ignored. *State v. O'Brien,* 857 S.W.2d 212, 216 (Mo. banc 1993).

In cases of first-degree murder involving accomplice liability, the jury must find that the defendant himself deliberated. *Id.* at 217-218. While the act of homicide may be imputed to an accomplice,

the element of deliberation may not be imputed by association. *Id.* Proof that a defendant merely aided another with the purpose of facilitating an intentional killing is not enough to prove first degree murder. *Id.* To make its case, the state must introduce evidence from which a reasonable juror could conclude beyond a reasonable doubt that the defendant (1) committed acts that aided his codefendant in killing the victims; (2) defendant's conscious purpose in committing the acts was that the victims be killed; *and* (3) defendant committed the acts after coolly deliberating on the victims' deaths for some amount of time, no matter how short. *Id.*

In *State v. Gray*, 887 S.W.2d 369 (Mo. banc 1994), a companion case, this Court addressed the question of accessory liability. In examining the evidence, the Court noted three circumstances that appear "highly relevant in determining if accomplice deliberation may be inferred." *Id.* at 376. The first circumstance is whether there is a statement or conduct by the defendant or by a codefendant in the presence of defendant prior to the murder indicating a purpose to kill someone. *Id.* Another is evidence that the murder was committed by means of a deadly weapon and the accomplice was aware that the deadly weapon was to be used in the commission of the crime. *Id.* at 377. Finally, evidence of deliberation will be found where it appears that the defendant either participated in the homicide or continued in the criminal enterprise even after it became apparent that a victim was to be killed. *Id.*

In this case, there is ample evidence of statements or conduct by the defendant or in the defendant's presence indicating a purpose

to kill. When the plan was first conceived, Marlin Gray announced that he "felt like hurting someone." While the rapes were occurring, someone—by inference either appellant or Antonio Richardson - said to Julie Kerry: "You stupid bitch, do you want to die? I'll throw you off the bridge if you don't stop fighting."[1] Appellant threw the sisters' clothes off of the bridge. After the rapes, first Richardson and then the appellant each put one of the Kerry sisters through the manhole to the platform below the bridge deck, from which the sisters were pushed to their deaths. Appellant then returned to the bridge deck where, after robbing Cummins, he discussed with Winfrey whether Cummins should live or die. Gray or Richardson could not have taken part in this discussion because Richardson was under the bridge and Gray had already started to walk off the bridge. Someone told Cummins that he never had the pleasure of "popping" someone before. If appellant did not say this, it was said in his presence. Appellant then took Cummins and moved him next to the manhole, ordering him to lie down. Someone—either appellant or Winfrey—said, "You're going to die," after which appellant put Cummins into the manhole, before sending Winfrey to look for Gray and following Cummins through the manhole to the platform beneath the bridge himself. Once underneath the bridge, either appellant or Richardson pushed the Kerry sisters from the bridge and ordered Cummins to jump into the river. Afterward, appellant bragged, "We threw them off."

---

1. Even if appellant did not make the statement, it is reasonably inferred that it was made in this presence.

Statements made by the defendant or in his presence indicated an intention to kill. Appellant continued to play an active role in the death-producing events, even after it became abundantly clear that the victims would be killed. The evidence of deliberation in this case is substantial, compelling, and without doubt. The trial court did not err in submitting the charges of first degree murder to the jury.

B.

PENALTY PHASE ARGUMENT

Appellant submits numerous allegations of improper argument by the prosecutor during the closing argument of the penalty phase proceedings. Only one of appellant's contentions was preserved for review on direct appeal.

Appellant contends that the prosecutor, Nels Moss, made an improper reference to Charles Manson and John Wayne Gacy. Prior to closing arguments in the guilt phase, the Court had made the following ruling:

> [T]he prosecutor can't use any analogy involving Charles Manson, or raising any type of a horrible and well-known scenario and get the jurors thinking about it. I'm not saying you're going to compare it, but just get the jurors thinking about it.

However, despite that ruling, the prosecutor, during the penalty phase closing arguments, said the following:

> [The fact that Clemons] has no significant history of prior criminal activity, you know, the same can be said of John Wayne Gacy, Charles Manson, the fellow that killed the seven-

The trial court sustained the defense's objection to the prosecutor's statements, admonished the prosecutor to refrain from such argument, ordered the comments stricken from the record, and ordered the jury to disregard the comments. The trial court refused to declare a mistrial, however. Later, in a separate proceeding, the court found Moss guilty of criminal contempt for his deliberate violation of the court's order and fined him $500.

Appellant argues that the trial court's corrective measures were inadequate and that the deliberate misconduct on the part of the prosector warrants a reversal because the prosecutor's misconduct seriously affected the integrity or public reputation of the proceedings. *United States v. Atkinson,* 297 U.S. 157, 160 (1936).

The critical component of due process analysis in cases involving prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips,* 455 U.S. 209, 219 (1982). Mistrial is a drastic remedy reserved for the most extraordinary circumstances. *State v. Johnson,* 901 S.W.2d 60, 62 (Mo. banc 1995). A decision whether to grant a mistrial is left to the sound discretion of the trial court. This rule recognizes that the trial court is in the best position to observe the impact of the problematic incident. *State v. Parker,* 886 S.W.2d 908 (Mo. banc 1994). Review is for abuse of discretion. *Id.* Reversal is

mandated where the failure to grant a mistrial resulted in a denial of a fair trial.

The trial court did not abuse its discretion in refusing to declare a mistrial in this case. In striking the statement from the record and ordering the jury not to consider it, the trial court took sufficient corrective measures to ameliorate any prejudice the prosecutor's statement created.

C.

CLEMONS'S CONFESSION

Appellant asserts that the trial court erred in refusing to suppress certain statements made by him because authorities obtained those statements in violation of his constitutional rights. In this regard, appellant claims that the police beat him in order to obtain a confession. He also contends that the police continued to interrogate him after he invoked his right to remain silent and his right to counsel. He argues that any statements he made to a family friend should also have been suppressed because that family friend was a police officer and the friend's questioning of appellant constituted a custodial interrogation.

In reviewing the trial court's ruling on a motion to suppress, this Court will sustain the trial court's determinations unless there is insufficient evidence to support the rulings. *State v. Rodriquez*, 877 S.W.2d 106, 110 (Mo. banc 1994). In reviewing the evidence, we consider all evidence and reasonable inferences in the light most favorable to the trial court's ruling. *Id.*

The facts show that about 6:00 p.m. on April 7, 1991, Officers Walsh and Brauer went to appellant's home and, finding him there, asked him if he would accompany them to police headquarters, as his name had surfaced in "the bridge case." Appellant agreed to accompany them. The officers did not handcuff nor arrest him, and appellant was free to leave.

Appellant arrived at police headquarters with the officers at about 6:30 p.m. The Police advised him of the rights protected by the *Miranda* warnings. Appellant indicated that he understood those rights, did not want a lawyer, and was willing to talk to the police. A 45-minute interview ensued, followed by a 20-minute break; and then another interview which lasted between an hour and an hour and a half. At the conclusion of the second interview, the officers arrested appellant. Appellant agreed to make an audiotaped confession. Prior to the taped confession, police again advised appellant of his constitutional rights. Appellant waived those rights in writing again.

1.

Appellant claims the police beat him, rendering his confession involuntary. At the suppression hearing, appellant testified that the police officers conducting the interrogation beat him about the head and chest and slammed his head against the wall. The detectives involved categorically denied that any physical contact occurred. Appellant's initial attorney in this matter testified that he visited appellant in a holding cell at police headquarters the afternoon of April 8th, some 14 hours after appellant's interview had concluded,

and observed that the right side of appellant's face was swollen. However, Warren Williams, a friend of appellant's family who is employed as a police officer, visited appellant at the request of appellant's mother and saw appellant literally minutes before appellant's attorney arrived. Williams testified that he did *not* observe any sign of injury. The next day, April 9, at appellant's arraignment, the presiding judge ordered that appellant be examined at the emergency room at the Regional Hospital. According to the hospital records, appellant was diagnosed with myalgia,[2] mild myositis,[3] and a swollen right cheek.

Viewing this evidence in the light most favorable to the trial court's ruling, we find sufficient evidence to support the trial court's finding that appellant's confession was voluntary. The trial court had the opportunity to judge the credibility of the witnesses and obviously found the state's witnesses' testimony more credible than appellant's. While there was additional testimony from appellant's family that appellant's face was swollen, all of these observations were made some 48 hours or more after appellants' interview and confession. The evidence, including the hospital records, simply does not demonstrate either when or how appellant incurred any injury. Nor does it establish that an injury actually occurred at the hands of the police officers conducting his

---

2. "Myalgia" is defined as pain in one or more muscles. Blakiston's New Gould Medical Dictionary (1956).

3. "Myositis" is inflammation of the muscles. Blakiston's New Gould Medical Dictionary (1956).

interview. Appellant failed to meet his burden. We find no abuse of discretion in failing to suppress appellant's confession on these grounds.

2.

Appellant also claims that the trial court should have suppressed his statements because police officers ignored his invocation of his right to remain silent and his right to counsel.[4] This alleged assertion took place at the beginning of appellant's audiotaped confession. Appellant claims that the taped statement demonstrates that the police violated the rule announced in *Miranda*.

The audio taped statement begins with the police reading each *Miranda* warning and asking appellant whether he understands that right. Appellant states that he does. Detective Pappas then asks:

---

4. Appellant does not dispute that he received the *Miranda* warnings. For reasons that are not clear to us, both the state and appellant argue as to whether appellant was "in custody" when he was brought to police headquarters. The detectives testified that appellant was free to leave at any time up until the point where they placed him under arrest after the interview. Appellant claims that a reasonable person in his position would not have thought he was free to leave. Whether appellant was in custody or not when the initial interview began is irrelevant because the detectives read appellant his *Miranda* warnings prior to the interview and he stated that he was waiving those rights and was willing to talk to the police. Thus, even if appellant was "in custody" when the initial interview began, he had been read the *Miranda* warnings and he waived his rights.

> Q. Okay. At this time, Reginald ... do you wish to waive these constitutional rights and make a statement concerning what happened on the night of April 5th, 1991, on ... the Chain of Rocks Bridge?
>
> A. No, sir.

Appellant cites language in *Miranda* that states that questioning must cease if the suspect "indicates in any manner and at any state of the process that he wishes to consult with an attorney before speaking." 384 U.S. at 444-445. Appellant maintains that when he said, "No, sir," in response to the officer's question, he asserted his intention not to waive his constitutional rights and that the interview should have stopped at once. Instead, the police continued questioning as follows:

> Q. Okay, you do - you don't want to make a statement at this time?
>
> A. I don't want to use the rights.
>
> Q. In other words ... you're waiving your rights to make a statement. ... Is that right?
>
> A. Yes.
>
> Q. Okay. So you're waiving your constitutional rights?
>
> A. Okay, sir.

DET. BRAUER: ... [W]hat it means is that you give up those rights and that you want to talk about the incident. Is that what you want to do? Tell us about the incident?

A. Yes, sir.

DET. BRAUER: Okay. That's what we mean. That's what it means to waive your rights.

DET. PAPPAS: All that means is that you want to waive these rights at this time to make ... an audio taped statement. That's what we're talking about. Okay. Do you still understand what we're saying? I don't want you to be confused about this.

A. Yes. I want to tell everything that happened up on the bridge.

Q. Okay. So you're wishing to make a statement?

A. Yes.

Despite appellant's hopeful, contrary claim, the transcript clearly shows that appellant affirmatively waived his rights and agreed to make an audio-taped statement. Undaunted, appellant contends that the dialogue clarifying his intent should not be considered at all, in that his initial response—"No, sir"—was an unequivocal statement of his intent to exercise his rights. Thus, the police should immediately have ceased any questioning of any type.

We disagree. Unlike appellant, we do not read *Miranda* searching for out-of-context sentences that support a preferred outcome. Honestly read, *Miranda* contemplates situations in which there may be some question as to whether a defendant wishes to assert his rights or not. In such instances, the interviewer may clarify the defendant's intent by continued questioning as to

whether or not the defendant does or does not waive his rights. *Miranda v. Arizona,* 384 U.S. 436, 485 (citing with approval Federal Bureau of Investigation procedures for conduct of custodial interviews with respect to subject's constitutional rights).

In light of the fact that appellant had been freely speaking with the police for the past two hours, had already confessed, and had agreed to make a tape-recorded statement before the detectives began to record the confession, we find that appellant's response was not an unequivocal assertion of his rights but rather an ambiguous, equivocal statement of his intent that required clarification. The detectives did not violate appellant's constitutional rights by asking questions to clarify his intentions. His intentions, as reflected by the entire conversation, were to waive his rights and make a statement.

The trial court did not abuse its discretion in failing to suppress the taped confession.

3.

Finally, appellant contends that the trial court erred in refusing to suppress statements he made to Warren Williams because appellant made those statements during a custodial interrogation and appellant had not waived his Fifth and Sixth Amendment rights.

Appellant's mother, Vera Thomas, grew concerned when she heard nothing from appellant after he left with the homicide detectives early in the evening of April 7th. Thomas called a friend of the family, Warren Williams, a police officer who was once

married to Thomas's cousin, and asked him to try to discover what had happened to appellant. Williams made a few phone calls and found that appellant was in the men's holdover at police headquarters. Williams, who had known appellant since appellant's birth, visited appellant at the holdover on the afternoon of April 8th. During the course of this visit, appellant told Williams that he had gotten mixed up with the wrong people, and that they had gotten drunk and raped two girls. Appellant said that one of the other boys pushed the girls into the river, out of concern that the girls might later identify him.

Appellant now contends that the trial court should have suppressed this statement as the fruit of a custodial interrogation before which he had not waived his Fifth and Sixth Amendment rights. Appellant observes that he was in custody, that Williams was a police office (although dressed in plain clothes at the time), and that appellant knew that Williams was a police officer. The state, on the other hand, counters that Williams acted as a concerned friend of the family, not in his official capacity as a police officer, when he met with appellant that afternoon. Furthermore, appellant had previously received the *Miranda* warnings and had waived his rights at that time. Even if Williams were acting as a police officer, the state contends, it was unnecessary for him to read appellant the *Miranda* warnings again.

Miranda warnings are not so ephemeral that they evaporate between questionings. Once received, and the constitutional rights they protect waived, the waiver remains in effect until undone by the person in custody. The point is denied.

4.

On a related point, appellant also alleges that his counsel ineffectively presented his suppression motion to the trial court. Appellant judges the motion itself insufficient and counsel's representation deficient in failing to call three witnesses to testify at the suppression hearing.

Appellant first charges that his counsel failed him in neglecting to cite what he characterizes as "controlling precedent" in the motion to suppress filed with the trial court. This "controlling precedent"—apparently *Miranda* (appellant never specifies) -- allegedly establishes that once appellant said "no," all questioning had to cease. As we have said, appellant overlooks the further teachings of *Miranda* that allow continued questioning in an effort to clarify a suspect's intent when that intent is not clear. For the reasons previously stated, appellant's argument on the merits is incorrect. The motion court properly did not fault counsel for failing to argue a legally-insufficient point more vociferously.

Appellant next contends that his counsel's failure to call Dr. Reynal Caldwell, Cedric Richardson, and Marie Hicks to testify about appellant's facial injuries at the suppression hearing was ineffective. To support a claim of ineffective assistance, appellant must show that the witnesses would have testified if called and that testimony would have aided appellant's defense. *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. 1995). As the following discussion shows, the testimony of none of these witnesses would have made any difference in the outcome of the suppression hearing.

At the Rule 29.15 hearing, Dr. Caldwell testified that it appeared appellant had been injured in that there was apparent swelling in the facial area. This testimony was based upon his review of hospital records and photographs of the appellant, not on actual examination of the appellant. Dr. Caldwell testified that he could not offer an opinion as to how or when the injuries occurred. His testimony would have added nothing to the evidence already presented at the suppression hearing. Appellant cannot be prejudiced by a failure to present cumulative testimony. *See, e.g. State v. Kinder,* 942 S.W.2d 313, __ (Mo. banc 1996).

Cedric Richardson is a personal friend of appellant and the brother of Antonio Richardson, one of appellant's codefendants. The motion court, in its findings of fact, found that his testimony was not credible, in large part due to these relationships. Our review of his testimony leads to a similar conclusion. The testimony is grossly inconsistent with that of other parties. For example, Richardson testified that he was in the car with police when they arrived at appellant's house; that the appellant came outside to talk to the police; that while the police were talking to him, appellant's mother arrived home; and that Richardson accompanied appellant and the officers to police headquarters. This testimony is completely at odds with testimony of appellant's mother on this point. Other testimony indicated that no one was in the car with the police when they arrived at appellant's home; that appellant's mother let the police into the house; that the detectives encountered appellant only after they entered the house; and that appellant rode alone in the back seat of the detectives' car when they left for the police station.

Finally, appellant avers in his brief that Marie Hicks would have testified that she observed swelling on appellant's face "at the end of the 48 hour period." Ms. Hicks served as an intake officer at the St. Louis County jail. First, the "48 hour period" is not sufficiently described to know the 48 hours to which appellant refers. Assuming that the 48-hour period began when appellant arrived at the police station that Sunday night, Hicks' testimony cannot establish exactly how or when appellant received his injury. Her testimony would have been cumulative, at best.

The motion court did not err in overruling the Rule 29.15 motion on this point.

D.

1.

FUNDS FOR MENTAL HEALTH EXPERTS

Appellant claims error on the part of the trial court in denying his request for funds to provide for expert testimony on his mental state. He maintains that his mental condition was crucially relevant to his criminal culpability and the punishment he faced. He cites *Ake v. Oklahoma*, 470 U.S. 68 (1985), for the proposition that due process requires that he be allowed access to expert witnesses.

Ake says:

> A defendant's mental condition is not necessarily at issue in every criminal proceeding ... and it is unlikely that psychiatric assistance . . . would be of probable value in

> cases where it is not. The risk of error from denial of such assistance, as well as its probable value, is most predictably at its height *when the defendant's mental condition is seriously in question* .... [W]hen a defendant demonstrates to the trial judge that *his sanity at the time of the offense is to be a significant factor* at trial, the State must, at a minimum assure access to a competent psychiatrist ...."

(Emphasis added.) 470 U.S. at 82-83.

Appellant claims he met the *Ake* "seriously-in-question" standard by filing a notice of intent to raise diminished capacity and a notice of mitigating circumstances. However, these bare notices, without more, are insufficient to show the trial court that appellant's mental condition would, in fact, be a significant factor at trial.

Any defendant can make a bald statement of diminished capacity or claim that he acted under extreme mental duress. The State is not required to provide expert psychiatric assistance based on unsupported allegations, however. To qualify under *Ake*, a defendant must allege facts, not state mere legal conclusions or theories, to show the trial court that his or her mental condition is relevant to the issues before the trial court.

Appellant states that his pretrial motion seeking funds and the suggestions in support thereof demonstrate the relevancy of his mental condition. Appellant's motion states:

> Missouri law makes Reginald Clemons's mental condition relevant to criminal responsibility and sentencing in many significant ways: (a) competency at trial and sentencing;

> (b) specific intent to commit first degree murder; (c) legal insanity or diminished capacity; (d) competencies to waive his rights, including the right not to incriminate himself and to waive counsel; (e) mental health issues as they relate to mitigation of sentence.

This survey of the ways in which a mental condition may be relevant in some criminal cases does not demonstrate any reason for the trial court to find that appellant's actual mental condition was, in fact, seriously at issue in this case. Appellant's motion does not assert a fact-based claim that he was legally insane at the time of the crime, or that he was incompetent to stand trial, or that he was incapable of forming the specific intent to commit the crime.

The only "facts" appellant alleges in his motion and attached affidavits regarding his mental condition are that he suffers from learning disabilities and attention deficit hyperactivity disorder (ADHD) and speculation that he "might" have a neurological defect. The mere allegation of any abnormal mental condition is not enough to cross the *Ake* threshold; not every mental abnormality is relevant to a defendant's mental state for the purposes of criminal culpability. In addition, mere speculation as to a mental defect, without alleging any basis to support the speculation, is insufficient to raise the issue under *Ake*. Appellant's allegations and speculations do not rise to the level of significance necessary to cross the *Ake* threshold; they do not put the defendant's mental state "seriously in question" or render it likely to be a "significant factor" at trial.

Appellant also filed a motion requesting an order to allow a particular psychologist to examine him regarding diminished capacity and death penalty issues. He claims he needed such an investigation because there would be an issue at trial "as to who was the leader and who were the followers, whether defendant understood the *Miranda* warnings, (and) whether defendant understood the consequences of his actions including the criminality of his acts." The motion fails, likewise, to allege any facts to suggest that these questions were seriously in issue or from which the court might infer a genuine possibility that appellant did not or could not understand the criminality of his acts. We repeat: A mere allegation that a defendant's mental capacity is at issue does not make it so. Facts supporting the allegation are necessary to show the seriousness of the allegation and its relevancy to the issues before the trial court.

Appellant's case, therefore, is entirely different from those he cites in support of his claim. In *Ake,* the defendant's behavior was so bizarre that the trial judge *sua sponte* ordered a mental examination, which revealed the defendant to be a paranoid schizophrenic. In *Starr v. Lockhart,* 23 F.3d 1280 (8th Cir. 1994), the defendant presented the court with mental health records demonstrating a diagnosis of mild to moderate retardation. In *Kenley v. Armontrout,* 937 F.2d 1298 (8th Cir. 1991), records showed defendant's history of suicide attempts, various diagnoses of possible mental problems throughout his life, abnormal EEG's, and records of treatment dating back some 13 years before the crimes in question occurred.

In each of these cases, the defendant offered a factual basis to demonstrate a significant concern about the defendant's mental condition as it related to the crime. Such a factual basis is wholly absent in this case. Claims of learning disabilities and ADHD are not mental conditions that, of themselves, are so consequential as to become a significant factor where the issue is appellant's mental condition as it relates to his criminal culpability.

We conclude that appellant did not put his mental state *seriously* at issue or provide any factual support for a claim that it might reasonably become a *significant* factor at trial. The trial court did not abuse its discretion in failing to grant appellant's motion requesting funds for mental experts.

Alternatively, appellant charges that the State made his mental state an issue, thus triggering his rights under *Ake*. *Ake* states that "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." 470 U.S. at 80. Appellant claims that the state made appellant's mental state an issue when it submitted the depravity of mind aggravator.

A superficial glance at the jury instructions demonstrates that "depravity of mind" is not based upon a psychiatric evaluation of a defendant's mental state, but rather is evidenced by the horrible nature of the circumstances of the homicide. *See, e.g.*, MAI-Cr3d

313.40 (Notes on Use 7).[5] The State need not put on psychiatric testimony to prove depravity of mind (and in fact, did not put on any such testimony in this case) and the defense has no need of psychiatric expert testimony to refute it. The use of the depravity of mind aggravator does not put the defendant's mental condition at issue.

2.

In a related claim, appellant finds his counsel ineffective in the penalty phase for failing to call mental health experts to testify. Appellant contends that counsel's decision not to call these witnesses was not an informed, strategic decision because counsel failed adequately to investigate possible mitigating circumstances to present at penalty phase.

Counsel's presentation of penalty phase evidence is a matter of professional judgment. *Antwine v. State*, 791 S.W.2d 403, 407 (Mo. banc 1990). No duty exists in counsel to present mitigating character evidence at penalty phase. *Clemons v. State*, 785 S.W.2d 524, 528 (Mo. banc 1990). Defense counsel is under no obligation

---

5. Depravity of mind will be found, for example, if the jury finds that the defendant inflicted physical pain or emotional suffering on the victim for the purpose of making the victim suffer before dying; if the defendant committed repeated and excessive acts of physical abuse upon the victim; if the victim was bound or otherwise rendered helpless; if the victim was physically disabled; if the defendant purposely mutilated or grossly disfigured the body, etc.

to present the defendant's background in mitigation in a death penalty case. *Schneider v. State*, 787 S.W.2d 718, 721 (Mo. banc 1990).

Defense counsel hired Maryann Marxhors to investigate appellant's background to determine whether psychiatric evidence would avail defendant in either the guilt or penalty phase. Armed with appellant's school and medical records, counsel consulted with a psychiatrist in California to see whether he might help defendant's case. This psychiatrist indicated that he would be "crucified" on cross-examination, due to material in the records which suggested that appellant was aggressive. On the basis of this investigation, counsel chose not to put on any psychiatric evidence.

Appellant insists that counsels' decision was not strategic because it was not well-informed. The record shows otherwise. Counsel did attempt to investigate as to whether any substantive claims existed relating to a mental defect or diminished capacity in appellant. Counsel ultimately determined that the adverse inferences from such evidence, as well as potential rebuttal evidence brought out in cross-examination by the prosecution, outweighed the potential good such evidence might have produced. This was an informed, strategic choice that is not subject to the judgment of hindsight. *Cheek v. State*, 459 S.W.2d 278, 281 (Mo. 1970).

Moreover, as we observed above, we have reviewed the testimony of appellant's experts at the Rule 29.15 hearing and found that the testimony was not such that it made it probable that the outcome of the penalty phase would have been different. Appellant's point is denied.

III.

Appellant raises numerous claims of trial court error on direct appeal that were not properly preserved because they were either not objected to at trial or not raised in the motion for new trial. These claims are reviewable, if at all, only for plain error. *State v. Ervin,* 835 S.W.2d 905 (Mo. banc 1992). Rule 30.20. The "plain error" rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review. *Ervin,* 835 S.W.2d at 920. Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not correct. *State v. Parker,* 856 S.W.2d 331, 333 (Mo. banc 1993).

In *State v. Brown,* 902 S.W.2d 278, 284 (Mo. banc 1995), this Court said:

> [U]nless a claim of plain error facially establishes substantial grounds for believing that "manifest injustice or miscarriage of justice has resulted," this Court will decline to exercise its discretion to review for plain error under Rule 30.20. We will, however, consider related claims of ineffective assistance of counsel for failure to preserve the alleged trial error under the test of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

None of appellant's unpreserved claims raise a substantial ground for finding plain error Therefore, we decline to subject these claims to our discretionary review under Rule 30.20. However, to the extent appellant properly raises the issue under Rule 29.15, we

will review appellant's additional claims for ineffective assistance of counsel, either for failure to preserve the alleged trial error or for the ineffective assistance regarding the circumstances of the trial error itself.

A.

JURY SELECTION

Appellant insists he received ineffective assistance of counsel when defense counsel failed to "[p]revent the prosecutor from using improper questions during voir dire." This failure led the trial court to exclude six venirepersons for cause on the issue of death qualification. A ruling on a challenge for cause must be based on the whole record. *See State v. Kinder*, 942 S.W.2d 313, ___ (Mo. banc 1996).

The trial court struck venirepersons Passalacqua, Sandars, Elrod, Stewart, Jones, and Munsell for cause because they expressed an inability to consider the death penalty for an accomplice who did not commit the act that led directly to the victims' deaths.

During the death qualification portion of voir dire, the prosecutor explained the concept of accomplice liability, at times using hypotheticals for this purpose. He asked prospective jurors whether they would be able to sentence an accomplice to death where the evidence did not show that the accomplice committed the act that directly caused the victims' deaths. Appellant charges that

the prosecutor's hypotheticals misled the members of the venire because the hypotheticals dealt with an accomplice to robbery, rather than first degree murder, and because the prosecutor's explanations did not make clear that the accomplice also had to have the requisite intent to commit the crime.

The nature and extent of questioning on voir dire is within the discretion of the trial judge. Only a manifest abuse of discretion and a probability of prejudice to the defendant will justify reversal. *State v. Storey*, 901 S.W.2d 886, 892 (Mo. 1995).

In *State v. Seddens*, 878 S.W.2d 89 (Mo. App. 1994), the defendant, who was convicted of first degree murder, argued that the prosecutor's use of hypotheticals during voir dire led the jury to "an erroneous definition of accessorial liability." *Id.* at 92. The court noted that the jury ultimately received the approved instruction on accessorial liability, a modified version of MAI-CR3d 304.04:

> A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with him with the common purpose of committing that offense, or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

The *Seddens* court found that the prosecutor's hypotheticals did not diverge from the instruction and, thus, no abuse of trial court discretion occurred. In the present case, the jury received an identical instruction. We have reviewed the prosecutor's hypotheticals. They do not deviate from the language of the

approved instruction and did not misstate the basic concept of accessory liability.

Appellant, however, relies on the Notes on Use to MAI-CR3d 304.04 for the proposition that for a jury to find an accomplice guilty of murder, the jury must find that the accomplice had the requisite intent. A first degree murder conviction requires the jury to find that an accomplice defendant deliberated. It is not necessary, however, for the prosecutor to make reference to the elements of first degree murder during death qualification of the jury. This is because the element of deliberation for the purpose of accomplice liability for first degree murder is relevant to a finding of guilt or innocence, not punishment.

Death qualification focuses on an entirely different issue. Death qualification attempts to determine whether a potential juror could consider the full range of punishment *if* the defendant is found guilty of first degree murder. Thus, when the prosecutor asks a potential juror whether he or she could recommend the death penalty for an accomplice, the assumption - solely for the sake of asking and answering the punishment question - is that the jury has already found the defendant guilty of all of the elements of first degree murder, including deliberation, beyond a reasonable doubt. For this reason, deliberation is not an issue when a venireperson considers whether or not he or she could impose the death penalty. The motion court did not err in holding that trial counsel was not ineffective in failing to preserve this non-error.

Appellant also claims that the trial court erred in striking venireman Doss for cause because Doss intimated that he could

vote for the death penalty in an accomplice case. Doss initially indicated that he could not vote for the death penalty at all. Under further voir dire questioning by the prosecutor, Doss said he might be able to vote for death under certain circumstances. Doss then equivocated, saying that he still would not be able to vote for the death penalty if appellant were only guilty as an accomplice and did not actually push the girls off of the bridge. After further questioning by the prosecutor, Doss said the prosecutor might be able to show him something that would allow him to consider the death penalty even if appellant did not do the actual pushing. The trial court ultimately sustained the State's motion to strike Doss.

While a trial court cannot exclude a juror from a capital punishment case simply because of a conscientious objection to the death penalty, a juror may be excluded if his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). The trial court has broad discretion in determining whether a prospective juror is "death qualified," as the trial judge is in a superior position to evaluate the demeanor and testimony of the prospective jurors. *State v. McMillin*, 783 S.W.2d 82, 93 (Mo. 1990).

Doss's equivocal and shifting responses to questions focusing on his ability to impose the death penalty provide a sufficient rationale for the trial court's decision to sustain the state's motion. In light of Doss's conflicting testimony, the trial court did abuse its discretion in striking Doss for cause. The motion court did not err in holding counsel not ineffective on this issue.

B.

PENALTY PHASE WITNESSES

Appellant submits that his counsel was ineffective at the penalty phase for failing to call certain witnesses. These witnesses would have testified as to appellant's alleged personality disorders and learning disabilities, as well as his passive, non-violent nature. Appellant contends that counsels' decision not to call these witnesses cannot be considered an informed, strategic decision because counsel failed adequately to investigate possible mitigating circumstances to present at penalty phase.

We have previously addressed and rejected appellant's claim of ineffective assistance regarding counsels' failure to offer expert mental health witnesses. In addition to psychological experts, however, appellant argues that counsel was constitutionally ineffective for failing to call lay witnesses who could have testified as to appellant's non-violent personality, as well as other circumstances of appellant's life that would have warranted the jury recommending a life sentence instead of the death penalty. In his brief, however, appellant only identifies one of these lay witnesses, Robbie Asbridge. Asbridge was involved in an altercation with appellant while both were confined in the city jail.

During the penalty phase, Dave Kovak, a social worker and supervisor at the city jail, testified that appellant received discipline for two violations while in the city jail, as a result of fighting with other residents and inflicting bodily harm. Asbridge was the other

pugilant in one of these altercations, and appellant argues that Asbridge would have testified that it was he, not appellant, who initiated the fight for which appellant was ultimately disciplined.

Appellant's trial counsel testified that he declined to call Asbridge because he did not find his testimony helpful. At the Rule 29.15 hearing, Asbridge testified that he started the fight with appellant by bumping into him, and that he told investigators he suffered his injury when he fell in the shower. However, Delores Elam, a lieutenant at the city jail at the time of the incident, also testified at the Rule 29.15 hearing. She indicated that she took a statement from Asbridge, who said that appellant had hit him, and that Asbridge was hospitalized with a broken jaw.

The record reveals that Asbridge's testimony at the Rule 29.15 hearing lacked credibility. Moreover, even if Asbridge could be believed, his testimony would have absolved appellant from but one of the fights for which he received discipline. The motion court determined counsel was not ineffective in failing to call Asbridge. The motion court did not err in this finding.

C.

USE OF RICHARDSON'S OUT OF COURT STATEMENTS

Appellant contends that his counsel was ineffective in failing to preserve objections to trial testimony regarding the confession of codefendant Antonio Richardson. Appellant argues that the

testimony concerning Richardson's confession was hearsay and, under the standards of *Bruton v. United States*, 391 U.S. 340 (1968), that testimony should not have been allowed into evidence because it violated the Sixth Amendment's Confrontation Clause. Defense counsel objected vociferously to any mention of Richardson's statement, but these objections were overruled. Counsel did not preserve them by including them in appellant's motion for new trial.

In *Bruton*, the Court held that admission of a codefendant's confession implicating the defendant, where the codefendant does not testify, violates a defendant's rights under the Confrontation Clause to cross-examine witnesses. 391 U.S. at 126.

While evidence in the record showed that Richardson made a statement, the precise contents of that statement did not come into evidence through any act of the prosecution. The jury did not hear a recording of Richardson's statement nor did they read a transcript of it. The prosecutor did not elicit direct testimony from any witness as to any details of what Richardson said in his statement. In short, the state did not elicit any direct testimony to the effect that Richardson's statement explicitly implicated appellant.

Rather, the defense elicited the most direct testimony to that effect. During the presentation of appellant's case, the defense asked Detective Chris Pappas: "And what Mr. Antonio Richardson said didn't implicate [Clemons]?" Pappas responded, "Yes, sir; it did implicate." Although this is clearly testimony regarding an out-of-court statement of Richardson that implicated the appellant, there is no *Bruton* violation where the defendant elicits the incriminating

out-of-court statements. *United States v. Karam*, 37 F.3d 1280, 1287 (8th cir. 1994).

Appellant ignores the above testimony in his brief, but rather concentrates on the prosecutor's alleged "end run" around the *Bruton* rule. Appellant charges that the prosecutor first elicited testimony that Cummins had made a statement implicating appellant, and then asked police officers whether Richardson's statements were consistent with those of Cummins. Thus, to the extent Cummins's recorded statements to the police implicated appellant, the jury could infer that Richardson's did as well.

The state contends such testimony was not hearsay because it was not offered for the truth of the matter asserted but rather to explain why the police turned their investigation away from Cummins. Appellant disagrees. He claims the testimony about Richardson's statement was offered solely to bolster Cummins's own statement and, thus, was offered for the truth of the matter asserted, rendering it hearsay.

We need not decide whether this indirect testimony as to the substance of Richardson's out-of-court statement is inadmissible because we do not see how appellant was prejudiced by the testimony. Even an obvious violation of *Bruton* does not mean automatic reversal. *Schneble v. Florida*, 405 U.S. 427, 430 (1972). Where the evidence of guilt is overwhelming and the prejudicial effect of the codefendant's statement is insignificant by comparison, the admission of the statement is but harmless error. *Id.* Reversal is not required unless there is a reasonable probability that the

improperly admitted evidence contributed to the conviction. *Id.* at 431.

The cross-examination testimony elicited by the prosecution regarding Richardson's statement, even if improper, was not so prejudicial as to warrant reversal. First, as noted above, defendant himself elicited the most direct testimony as to the content of Richardson's out-of-court statement. Second, there is no reason to conclude that references to Richardson's statements formed the essential foundation on which the jury built its verdict. This is because appellant's own statement admitted that appellant was on the platform underneath the bridge when Julie and Robin Kerry were pushed to their deaths.

Appellant maintains that any prejudicial effect was magnified, however, by the fact that the prosecution played a videotape, without sound, of Richardson walking along the bridge and pointing out various locations on the bridge to investigators. The trial court viewed the videotape prior to showing it to the jury, determined that there was no non-verbal statement by Richardson on the tape, and that the prejudice, if any, to appellant of Richardson's presence on the tape was outweighed by the probative value of giving the jury a visual layout of the crime scene.

In light of the strong case against appellant, the indirect nature of the prosecution's reference to the substance of Richardson's statement, and the fact that the only direct reference to the contents of Richardson's statement was elicited by the defense, we conclude that the motion court did not err in failing to find ineffective

assistance of counsel for failure to raise the claim in the motion for new trial.

D.

ALLEGED IMPROPER ARGUMENT AT GUILT PHASE

Appellant raises numerous claims of improper closing argument by the prosecutor during the guilt phase of trial, believing his counsel ineffective in failing to object. The motion court found no ineffective assistance; we will reverse the motion court's findings only if they are clearly erroneous. *State v. Copeland*, 928 S.W.2d 828, 844 (Mo. 1996). Counsel is not ineffective for failing to make non-meritorious objections. *State v. Kreutzer*, 928 S.W.2d 854, 876 (Mo. banc 1996). Thus, appellant must show that counsel's objection would have been upheld if made and that the failure to object resulted in a substantial deprivation of his right to a fair trial. *Ruff v. State*, 815 S.W.2d 460, 465 (Mo. App. 1991). Generally, failure to object during closing argument is not error, but rather a function of trial strategy. *State v. Wood*, 719 S.W.2d 756, 759-60 (Mo. 1986).

1.

Appellant first claims ineffective assistance because defense counsel failed to object when the prosecutor said:

> Now, here's the point. The evidence here is absolutely positive, without a doubt, overwhelming, overwhelming at this point. You know, that you have seen it all. So that presumption, I submit to you is dispelled.

Appellant claims this argument tells the jury to ignore the presumption of innocence. Read in context, the prosecutor's statement merely argues that the State has met its burden of proof and has overcome the presumption of innocence. The prosecutor did not tell the jury to ignore that presumption. The state's argument was not improper. The point is denied.

2.

Appellant faults counsel for failing to object to the prosecutor's allegedly impermissible references to appellant's failure to testify. The prosecutor did comment several times that the evidence against appellant was undisputed or uncontradicted. Merely stating that the evidence is uncontradicted is not a direct reference to a defendant's failure to testify. *State v. Lee*, 841 S.W.2d 648 (Mo. banc 1992).

Appellant contends that there was an indirect reference to his failure to testify in that the evidence the prosecutor labeled as "undisputed" could only have been contradicted by appellant. When

the accused is the only witness that can deny the evidence on a vital portion of the case, a general statement that such proof was undisputed has been held to be an indirect reference to the defendant's failure to testify. *State v. Arnold*, 628 S.W.2d 665, 669 (Mo. 1982). An indirect reference to a defendant's failure to testify is improper only where the prosecutor proceeds from a calculated intent to magnify the defendant's decision not to testify so as to call it to the jury's attention to that silence. *State v. Lawhorn*, 762 S.W.2d 820, 826 (Mo.banc 1988).

On review of the record, we believe that the motion court did not err on this point. This case does not present a situation where only the defendant could dispute the state's evidence. The point is denied.

3.

Appellant next contends that his counsel was ineffective in failing to object when the prosecutor said:

> And you must understand we can only - the law says we use Mr. Clemons' statement here. What anybody else said involved in this thing is not relevant and we can't bring it in.

Appellant contends this statement suggests that the prosecutor had additional incriminating evidence that he was simply unable to present to the jury. The prosecutor may make statements drawing legitimate inferences from the evidence, but he may not make statements that imply a knowledge of facts not before the jury.

State v. Whitfield, 837 S.W.2d 503, 511 (Mo. banc 1992). Contrary to appellant's assertion, the prosecutor is directing the jury not to speculate as to evidence outside of the record. The appellant is not prejudiced when the prosecutor explicitly states that any statements not in the record are *not* relevant to the case. The motion court did not err when it held that defense counsel was not ineffective for failing to object to this statement.

4.

Next in appellant's litany is his contention that his counsel failed to object when the prosecutor injected his own opinion as to appellant's guilt into his closing argument. The prosecutor referred to some of the defense's theories as "preposterous" and "in my opinion, probably ... pretty stupid." Appellant also claims counsel should have objected to such statements as: "If you listened to the evidence correctly, you saw what was going on here" and "to find Mr. Clemons not guilty is to leave every last ounce of common sense and reason you were ever born with on the doorstep of the courtroom."

Prosecutors may make reasonable inferences from the evidence. *State v. Weaver*, 912 S.W.2d 499, 512 (Mo. banc 1995). Prosecutors may make statements that indicate their opinion of the defendant's guilt, where it is apparent that the opinion is based on evidence in the case. *Id.* Prosecutors may also comment on the evidence and the credibility of witnesses, even to the point of belittling and or discussing the improbability of specific testimony. *Id.* at 513.

The prosecutor's statements here, read in context, do not impermissibly express the prosecutor's opinion. They are permissible arguments as to the strength of the case based on evidence in the record. The motion court did not err in failing to find counsel ineffective for failing to object to these statements.

5.

Appellant claims he suffered unconstitutional prejudice because his counsel did not object when the prosecutor told the jury that "there are people willing to do things to put that kind of evidence on that's obviously a lie." Appellant characterizes this statement as a personal attack on his defense counsel.

As we have said, a prosecutor may comment on the evidence and the credibility of witnesses, even to the point of belittling or highlighting the improbability of specific testimony. *State v. Weaver*, 912 S.W.2d at 513. Moreover, immediately prior to characterizing certain evidence as "obviously a lie," the prosecutor also said "[U]nderstand, I'm not blaming these lawyers for that kind of witness or information." The prosecutor's statements were not a personal attack. They were not prejudicial. The motion court did not err in failing to find counsel ineffective for failing to object to these statements.

6.

Finally, appellant submits that the prosecutor made various improper inflammatory arguments to which his counsel should have objected.

a.

Appellant claims the prosecutor appealed to the jury's fears by saying, "[I]f it were not for you, the people of the city would have no one to come to when they have been victimized." Defense counsel did not object.

Permissible prosecutorial arguments include references to the prevalence of crime in the community, the personal safety of its inhabitants, and that conviction of the defendant is part of the jury's duty to prevent crime. *State v. Debler*, 856 S.W.2d 641 (Mo. banc 1993). The prosecution may point out the possible societal effects of the general failure of juries to perform their duties. *State v. Danback*, 886 S.W.2d 204, 209 (Mo. App. 1994). The prosecutor's statement in this case fell within these perimeters.

b.

Appellant claims that the prosecutor discussed a hypothetical crime in order to inflame the jury, and that defense counsel should have taken steps to prevent this highly prejudicial hypothetical from reaching the jury's ears. The prosecutor said:

The man (Clemons) was co-equal with Mr. Antonio Richardson who pushed them off and Mr. Gray who organized it ... If you look at the evidence, that's what it is . Let me give you an example. What would you do if you had these ... two girls and the fellow outside of a room, and he raped them, both of them, he robbed the guy, and the other guys raped them, and it's at night, and so they send the girls into the dark.

MR. MOSS: Save my time.

MR. CONSTANTINOU: Just a minute, Your Honor, he's mischaracterizing the evidence, it's not something that's been introduced.

THE COURT: Proceed. Overruled, proceed.

MR. MOSS: The rape is outside this room and then you send them into a dark room. Okay? All of these three - of these people in a dark room. And Mr. Antonio Richardson goes into that dark room with a knife. And Mr. Clemons goes in there with a knife, and Mr. Gray and Mr. Winfrey stand outside; and the door is closed; and it's dark, nobody can see anything.

And when all is said and done, you open the door, and Tom Cummins is not dead, but he's laying there knifed. And Julie Kerry is laying there dead, with ten stab wounds in her; Robin Kerry is laying there dead with ten stab wounds in her. Okay? What do you know? Tom Cummins can't say, because it was dark, who put the ten

stab wounds in Julie, who put the ten stab wounds in Robin, or who put the stab wounds in him.

But you know darn good and well the only two people who walked into that dark room with a weapon and the knives, you know, in fact, were him and the other guy. So what are you going to say? Okay?

You got a bonus if you had a light bulb on, it would have made a difference. But we're going to distinguish now because we really don't know. It don't piecemeal out like that, when these fellows work together like that.

Appellant argues that this argument rendered his trial unfair because it misstated the basic tenets of accomplice liability; it was not remotely based on the evidence at trial; and was irrelevant to any issue presented at trial. While appellant correctly observes that his counsel *did* object early on in the particular argument at issue and was overruled, appellant contends that this objection was constitutionally insufficient, and that counsel should have continued to object as the prosecutor's hypothetical grew more egregious.

The prosecutor apparently used this hypothetical to illustrate the concept of accomplice liability. Appellant is correct to observe that the state's metaphor here failed to mention the necessity of the jury finding that both actors had the necessary mental state - deliberation.

The fact that an argument may be improper does not necessarily mean that counsel was ineffective for not objecting. In determining ineffective assistance, courts will weigh several factors,

including counsel's reason for not objecting, whether the jury was properly instructed on the law, and whether, in the total context of the trial, it was reasonably probable that the outcome would have been different absent the improper argument. *State v. Copeland*, 928 S.W.2d 828, 843 (Mo. 1996).

Applying these factors, we are aware that defense counsel testified at the Rule 29.15 hearing that he did not continue to object to the state's hypothetical because he was "getting tired of objecting and being overruled." Counsel's statement does not show a strategic reason for his failure to object. Thus, we must consider whether his failure to object resulted in prejudice.

In reviewing the context of the entire trial, neither the motion court nor we believe it reasonably probable that the outcome would have been different had the state's argument not been made. Ultimately, the jury received correct instructions on the law of accomplice liability. Any deficiencies in the prosecutor's argument were corrected by the trial court's instructions to the jury. *See, e.g. State v. Neal*, 849 S.W.2d 250, 255 (Mo. App. 1993). In the presence of overwhelming evidence of appellant's guilt and the propriety of the trial court's instructions to the jury on this issue, the motion court did not err in failing to find counsel ineffective on this point.

c.

Appellant claims that the prosecutor appealed to the jurors' religious sentiments when he said, "I trust you will pray about [your decision]." He also observed that life has value, God created it, and God will take it away. Defense counsel objected to this latter statement, noting that there had been no evidence of God in the case. The Court overruled this objection. As to the first statement, it does not even begin to rise to the level of "excessive Biblical ... references" against which this Court advised in *State v. Debler*, 856 S.W.2d 641, 656 (Mo. banc 1993). Appellant offers no explanation of how he suffered prejudice from these statements. The motion court did not err in finding no ineffective assistance on issues relating to these statements.

d.

Appellant asserts that his counsel was ineffective for failing to object when the prosecutor injected his personal opinion into the penalty phase argument by stating "[a]nd at this point, the truth being known, you know as well as I that the decision is death." A prosecutor may state his personal opinions on whether the death penalty should be imposed so long as that argument is fairly based on the evidence. *State v. Tokar*, 918 S.W.2d 753, 769 (Mo. banc 1996). The prosecutor's statements here is based on the evidence in the case. The motion court did not err in holding that defense counsel's failure to object did not constitute ineffective assistance.

e.

Appellant points to other prosecutorial arguments he considers improper in that they were inflammatory and not based on the evidence. The record reflects that defense counsel objected to these remaining arguments, and that the trial court sustained the objections. Appellant faults his counsel for not also requesting a mistrial. Where a defendant alleges ineffective assistance in his counsel's failure to ask for a mistrial, appellant must show a reasonable probability that he was deprived of the right to a fair trial. *State v. Light*, 871 S.W.2d 59, 63 (Mo. App. 1994). Such prejudice is demonstrated when it can be shown that a mistrial would have been granted by the court had it been requested. *Id.* Appellant has made no such showing in this case.

E.

1.

INSTRUCTIONAL ERROR

Appellant raises numerous allegations of instructional error regarding the aggravating circumstances presented at penalty phase.

a.

Among the aggravating circumstances submitted to the jury were the following:

> Whether the murder of Julie Kerry was committed while the defendant was engaged in the commission of another unlawful homicide of Robin Kerry.
>
> Whether the murder of Julie Kerry was committed while the defendant was engaged in the attempted commission of another unlawful homicide of Thomas Cummins.

Similar aggravators were submitted regarding the murder of Robin Kerry. Appellant claims that this instructional language is faulty because (1) the language allegedly allowed the jury to impose the death penalty on appellant based upon the actions of his codefendants; (2) the first instruction does not require the jury to find that *appellant* murdered Julie Kerry while he was engaged in murdering Robin Kerry; and (3) the instruction does not require the jury even to consider *who* murdered Julie Kerry. Thus, according to appellant, the jury could find that appellant was engaged in murdering Robin Kerry while the murder of Julie Kerry was committed by someone else (i.e., Antonio Richardson or Marlin Gray).

The instruction is not erroneous. The instruction follows the language set out in MAI 313.40.2. The instructions ask whether the first murder was committed while the defendant was engaged in the commission of *another* unlawful homicide. "Another" in this

context means "additional." The instruction does not allow the jury to find this aggravating circumstance against appellant based on the actions of a different defendant. The motion court did not err in holding that counsel was not ineffective in failing to object.

b.

Appellant next claims that there was sufficient evidence to support the aggravator that the murders were committed while perpetrating or attempting to perpetrate a robbery, and thus the aggravators should not have been submitted to the jury. Appellant argues there was no evidence that either he or his companions were actually carrying a deadly weapon and, absent such evidence, the jury could not find that a robbery had been committed or even attempted.

In Missouri, first degree robbery[6] occurs when a person forcibly steals property and in the course thereof he, or another participant in the crime, 1) causes serious physical injury to any person; or 2) is armed with a deadly weapon; or 3) uses or threatens the immediate use of a dangerous instrument against any person; or 4) displays or threatens the use of what appears to be a deadly weapon or dangerous instrument. Section 569.020, RSMo 1994. The evidence indicates that appellant told Cummins not to

---

6. The state, in its brief, observes that the statutory aggravator makes reference to "any degree of... robbery," and that second degree robbery does not require use or threatened use of a dangerous instrument. However, the instructions actually given to the jury in this case only made reference to first degree robbery.

move or he would be shot. Appellant or one of his co-defendants also told Cummins that he had never had the pleasure of "popping" someone before. The fact that neither appellant nor any of his companions were, in fact, carrying a dangerous weapon, is immaterial. They threatened the immediate use of a dangerous weapon. This is sufficient grounds to find that a robbery was attempted or committed. *See, e.g., State v. McCracken*, 829 S.W.2d 634 (Mo. App. 1992); *State v. Archer*, 814 S.W.2d 315 (Mo. App. 1991). The evidence supports the aggravating circumstance that the murders were committed in the course of a robbery. The motion court did not err in holding that counsel was not ineffective for failing to object.

c.

Appellant maintains that it was improper to use "duplicative" aggravators, that is, two or more aggravators which are evidenced by the same culpable conduct. For example, the jury found that the murders were committed during the perpetration of a robbery and for the purpose of receiving money or anything of monetary value. Appellant contends that this "double-counting" of aggravators misleads the jury. Similar arguments have been presented to and rejected by this Court. *See State v. Smulls*, 935 S.W.2d 9, 23 (Mo. banc 1996); *State v. Brown*, 902 S.W.2d 278, 293 (Mo. banc 1995) *State v. Wise*, 879 S.W.2d 494, 521 (Mo. banc 1994); *State v. Ramsey*, 864 S.W.2d 320, 337 (Mo. banc 1993); *State v. Griffin*, 756 S.W.2d 475,489 (Mo. banc 1988); *State v. Jones*, 749 S.W.2d 356, 365 (Mo. banc 1988); *State v. Walls*, 744 S.W.2d 791, 798-99 (Mo. banc 1988; *State v. Zeitvogel*, 707 S.W.2d 365, 369-70 (Mo.

banc 1986). The trial court did not err in holding that counsel was not ineffective for failing to object.

IV.

Section 565.035.3, RSMo 1994, requires this Court to determine

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

A.

Appellant claims that the death penalty recommended by the jury and imposed by the trial court in this case was the result of the influence of passion, prejudice, or arbitrary factors, brought about by the prosecutor's alleged gross misconduct throughout the trial. We have previously considered these claims of prosecutorial misconduct and found them to be without merit. Further, there is

nothing in the record to support a conclusion that the jury founded its recommendation of a sentence on passion of prejudice.

B.

We next consider whether the state presented sufficient evidence to support the jury's finding of the following statutory aggravating circumstances:

1) The murders of Julie and Robin Kerry were committed while appellant was engaged in the commission of another murder and an attempted murder;

2) The murders were committed while appellant was aiding or encouraging Richardson and Gray to perpetrate or attempt to perpetrate the offense of rape;

3) The murders were committed while appellant was aiding or encouraging Richardson and Gray in the perpetration or attempt to perpetrate robbery;

4) Appellant caused or directed Richardson and Gray to murder Robin Kerry;

5) Appellant murdered Robin Kerry for the purpose of receiving money or another thing of monetary value from Cummins;

6) The murders were committed for the purpose of avoiding the lawful arrest of appellant, Richardson, and Gray; and

7) The murders were outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind.

The record amply supports the conclusion that the evidence supported submissions and findings on all of the aggravating circumstances submitted to the jury.

C.

In considering whether the death sentence imposed in this case is proportionate, we consider the death sentence imposed in other cases. Appellant specifically argues that his punishment is disproportionate compared to other cases in which the defendant was not the actual killer. There have been many cases in which defendant received the death sentence even where it appeared that an accomplice had done the actual killing; *State v. Skillicorn*, __ S.W.2d __ (Mo. banc 1997) (No. 78864, decided April 29, 1997); *State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996); *State v. Gray*, 887 S.W.2d 369 (Mo. banc 1994); *State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993); *State v. Kilgore*, 771 S.W.2d 57 (Mo. banc 1989); *State v. Schlup*, 724 S.W.2d 236 (Mo. banc 1987); *State v. Roberts*, 709 S.W.2d 857 (Mo. banc 1986); *State v. Gilmore*, 681 S.W.2d 934 (1984).

This case involves multiple murders. The death penalty has been found appropriate in other cases involving multiple murders; *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993); *State v. Mease*, 842 S.W.2d 98 (Mo. banc 1992); *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992); *State v. Ervin*, 835 S.W.2d 905 (Mo. banc 1992);

State v. Powell, 798 S.W.2d 709 (Mo. banc 1990); *State v. Reese*, 795 S.W.2d 69 (Mo. banc 1990); *State v. Sloan*, 756 S.W.2d 503 (Mo. banc 1988); *State v. Griffin*, 756 S.W. 2d 475 (Mo. banc 1988); *State v. Murray*, 744 S.W.2d 762 (Mo. banc 1988); *State v. Young*, 701 S.W. 2d 429 (Mo. banc 1985); *State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984).

These murders were committed in conjunction with rapes. There are many cases in which the death penalty was imposed for murders committed in conjunction with rapes and other crimes involving force; *State v. Kinder*, 942 S.W.2d 313, __ (Mo. banc 1996); *State v. Kreutzer*, 928 S.W.2d 854 (Mo. banc 1996); *State v. Nunley*, 923 S.W.2d 911 (Mo. banc 1996); *State v. Richardson*, 923 S.W. 2d 321 (Mo. banc 1996); *State v. Gray*, 887 S.W.2d 369 (Mo. banc 1994); *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992); *State v. Ervin*, 835 S.W.2d 905 (Mo. banc 1992); *State v. White*, 813 S.W.2d 862 (Mo. banc 1991); *State v. Six*, 805 S.W.2d 159 (Mo. banc 1991); *State v. Powell*, 798 S.W.2d 709 (Mo. banc 1990); *State v. Reese*, 795 S.W.2d 69 (Mo. banc 1990); *State v. Petary*, 790 S.W.2d 243 (Mo. banc 1990); *State v. Griffin*, 756 S.W.2d 475 (Mo. banc 1988); *State v. Murray*, 744 S.W.2d 762 (Mo. banc 1988); *State v. Pollard*, 735 S.W.2d 345 (Mo. banc 1987); *State v. Young*, 701 S.W.2d 429 (Mo. banc 1985); *State v. Betts*, 646 S.W.2d 94 (Mo. banc 1983); and *State v. Mercer*, 618 S.W.2d 1 (Mo. banc 1981).

This case involves murders committed in an attempt to avoid arrest for other crimes. The death penalty has been upheld in cases where the murder was committed in hopes of avoiding arrest or

detection. *State v. Copeland*, 928 S.W.2d 829 (Mo. banc 1996); *State v. Richardson*, 929 S.W.2d 321 (Mo. banc 1996); *State v. Gray*, 887 S.W.2d 369 (Mo. banc 1994); *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993); *State v. Six*, 805 S.W.2d 159 (Mo. banc 1991); *State v. Kilgore*, 771 S.W.2d 57 (Mo. banc 1989); *State v. Griffin*, 756 S.W.2d 475 (Mo. banc 1988); *State v. Grubbs*, 724 S.W.2d 494 (Mo. banc 1987); *State v. Gilmore*, 661 S.W.2d 519 (1983); *State v. Foster*, 700 S.W. 2d 440 (Mo. banc 1985); and *State v. Johns*, 679 S.W.2d 253 (Mo. banc 1984).

The death penalty imposed in this case is proportionate to the sentence imposed in similar cases.

V.

We have carefully examined appellant's remaining claims and determine that they do not warrant written evaluation by this Court. We exercise our discretion not to burden the pages of the Southwestern Reporter because the points are either not properly preserved for review, are patently meritless or have been recently decided against appellant's position by an opinion of this Court. Each of these points are denied without further discussion. Rule 84.16(b).

VI.

The judgments are affirmed.

EDWARD D. ROBERTSON, JR.
JUDGE

HOLSTEIN, C.J., BENTON, PRICE,
LIMBAUGH, COVINGTON, JJ., AND
PARRISH, SP.J., CONCUR.
WHITE, J., NOT SITTING.

Appendix C

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

REGINALD CLEMONS,	)	
	)	
Movant,	)	
	)	PCR No. 3043
vs.	)	
	)	Division No. 13
STATE OF MISSOURI	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

Movant was charged with two counts of first degree murder, two counts of forcible rape, one count of robbery first degree, three counts of felonious restraint, and one count of assault first degree. The murder counts were severed from the others, and Movant was found guilty of first degree murder on both. Following a penalty phase hearing movant was sentenced to death for both murders. Movant filed his motion in the present cause pursuant to Rule 29.15 on November 1, 1993. A hearing was held on April 12-14 and on September 25-29, 1995 at which movant did not appear. Having

heard the testimony and having examined the records and files in this case, the Court now finds as follows:

FINDINGS OF FACT

1. Jeanene Moenckmeier was called initially at the hearing to lay a foundation for the introduction of the defense's trial files, which files were admitted but not as being the complete file; certain portions had been removed and such portions were identified.

2. Ms. Moenckmeier testified that movant's family had contacted her and Mr. Constantinou based on a referral by Melvin Leroy Tyler, an inmate of the Missouri Department of Corrections. She said that they had been retained in October 1991 and had entered their appearance in November 1991. Mr. Constantinou was to have responsibility primarily for direct and cross-examination whereas she was to have responsibility for assisting him at trial, handling witnesses at the penalty phase, coordinating evidence, witnesses, motions, instructions, taking notes, and speaking to the family.

3. Ms. Moenckmeier said that they had considered various defense theories and decided in part to attack the credibility of Thomas Cummins and in part to call witnesses to testify that movant did not commit the crimes. They also intended to impeach Mr. Winfrey as much as possible.

4. Robert Constantinou, one of movant's trial attorneys, testified at the evidentiary hearing on April 12-13, 1995. Mr. Constantinou said that he had interviewed movant and spoken with him several times. He said that he had also spoken with other

witnesses but that he could not remember which ones. He said that he went to the bridge where the murders took place at least two to three months prior to the trial. He believed that he had gone to the Circuit Attorney's office prior to trial to observe what they had in the way of exhibits and evidence. He did not specifically remember doing this but he testified that it was what they usually did in preparing for trial. He had also spoken with movant's prior attorney who had told Mr. Constantinou that "its beyond me" and he wanted to get off of the case.

Mr. Constantinou testified that he had used Howard Gage and Marianne Marxkors as investigators as well as two or three other investigators whose names he could not recall. He had also spoken to the coroner in the county where the body was found and decided the coroner would not be helpful to the defense.

Mr. Constantinou said that the defense had requested a continuance in December, 1992, in part based on the failure of the prosecution to comply with discovery requests, and also because he felt that the defense had not had sufficient time to prepare. He also wanted more time and money for a psychological examination. He was not able to recall at the hearing why a request for psychological testing was not made sooner. Ms. Moenckmeier said that the continuance was requested because they wanted more time to take depositions, they had not yet seen the prosecutor's file, they wanted to see what evidence and exhibits the prosecution had, they wanted to obtain an expert, and they felt that they were not sufficiently prepared for trial.

5. When asked whether the defense had deposed any witnesses, Mr. Constantinou said he was not sure. Ms. Moenckmeier testified that officer Pappas had not been deposed because the defense had a lot of other preparation that needed to be done, and because the officer was on vacation part of the time during which they wanted to talk to him.

6. Mr. Constantinou said that the defense was considering and had discussed using psychological experts as well as experts in other areas such as forensics.

On cross-examination Mr. Constantinou said that Dr. Nash was not called because the defense did not think he would be a good witness; the doctor did not think the evidence of asthma and hyper-activity would sway the jury in movant's favor. Based on conversations with movant, he said there was no indication that movant did not understand the proceedings or was not competent to stand trial. He further said that there were things in the records that he thought might sway the jury against movant such as aggressiveness, and a habit of getting away with "what he wanted to do."

7. Mr. Constantinou said that the defense had called a number of witnesses at the suppression hearing but could not recall which ones. In regard to movant's facial injuries, he said that the defense did not have a doctor who could testify after the fact in regard to the injuries; by the time they got on the case there was no doctor available who would testify in this regard.

8. Mr. Constantinou said that the defense had called an expert in the field of dentistry, that he did not recall how the defense got the witness, and that he thought, the witness did a good job.

9. Mr. Constantinou said that he had not objected to the guilt phase instructions, and specifically the verdict director, because he thought they were accurate which they were.

10. Mr. Constantinou had discussed movant on the telephone with a psychological expert in California. He said that he read the reports (school, medical) to the expert and was told that the expert thought he would be "crucified" at trial when he got to the parts of the reports that showed movant's aggressiveness. The defense decided the expert could not be of any help after this discussion; that the expert would hurt more than help the defense. Mr. Constantinou said that the defense wanted more time to follow up, but that a non-court ordered psychological exam was not done because of a lack of funds. He thought it would have been a good idea to have someone look into the psychological issues, and that was one reason Ms. Marxkors was hired: to investigate movant's background and the psychological aspects of the case. Ms. Moenckmeier said that Ms. Marxkors was hired some time in December 1992, and that she was to review the legal and court files, interview movant, get the names of witnesses, advise them as to which witnesses could be used, assist with motions, obtain educational, medical, psychological and social records, and generally prepare in trial preparation. She was retained in part because she had experience in death penalty cases.

11. Mr. Constantinou believed that a Dr. Wulfgram, an expert who does pro bono work, was consulted and after speaking with the doctor he decided he could not use him. The defense discussed the issue and was not sure it was a good idea to bring forward psychological evidence because of the aggressiveness problem.

12. When asked why he did not object during the death qualification of the jury by the state Mr. Constantinou said that he had filed a number of motions, but could not remember specifically whether he objected to particular questions and if not, why not.

13. Mr. Constantinou said that he did not make a gender based *Batson* challenge because he did not believe that the state's strikes were based on gender.

14. When asked about subpart O in movant's motion, Mr. Constantinou testified that he felt the jury as finally impanelled was a fair jury. He said that he did not think the Missouri rules are fair but that within such rules he thought the jury was the best that they could have gotten. He said that in hindsight he would have liked to have had more peremptory strikes, but at the time of trial he thought he had enough.

15. In regard to venireperson Ruesche, he said that he did not include any allegation in the new trial motion because he did not think that it was important, and she did not serve on the jury.

16. Mr. Constantinou did not recall why Martha Jaeger was not called as a witness.

17. When asked why he did not use a letter written by Daniel Winfrey to Amanda, his girl-friend, Mr. Constantinou said that he thought Mr. Winfrey had been impeached, that he felt at the end of cross-examination that it was better to leave Mr. Winfrey alone rather than going further into the matter, and that he thought the letter contained other material that would have been very damaging to the defense. He thought the overall letter would have been very damaging.

18. In regard to Michael Chapey, Mr. Constantinou said that after meeting with the witness he decided he could not be trusted, that part of what he was saying was not true, and that the decision whether to pursue the matter of his asserting Fifth Amendment rights was a judgment call he made at the time. He thought it apparent at the time that this witness would not be cooperative with the defense and could hurt more than help.

19. Ms Frix was stricken through the use of a peremptory strike and did not serve on the jury.

20. When asked about why he did not object to the prosecutorial misconduct set out in Claim XII, Mr. Constantinou said that he had objected at times although no continuing objection had been made, that he could not say now why a continuing objection was not made, and that he did not include the claims in the new trial motion because he did not think they were sufficiently prejudicial. The objections he made at trial had been overruled.

21. In regard to Claim XIV, Mr. Constantinou said that he had no recollection of the alleged victim characteristic and impact

evidence other than the testimony regarding the victims being good students, and that he had not objected because he did not think it was impact evidence and did not think it was very prejudicial. On cross-examination Mr. Constantinou said the evidence came in at the stage of the trial where the prosecution was trying to show that the victims were no longer around. While the evidence had victim impact aspects, he did not feel that it was necessary to object or request a mistrial.

22. Constantinou said in regard to Claim XV that he did not believe the order of witnesses at the pretrial hearing indicated that he thought the state had met its burden of proof and that he put on his witnesses for reasons of expediency. He had no recollection as to why or whether any evidence regarding an internal affairs investigation had been presented and he had no recollection as to whether Cedrick Richardson, officer Pappas or officer Jacobsmeyer had been called and if not, why not. When asked why he did not call up the motion to suppress sooner, so that a transcript could have been available at trial, Mr. Constantinou said that he thought the defense had done a good job, he did not believe having a transcript would have helped at trial because the trial commenced immediately after the hearing, and he had notes as to what the witnesses said at the hearing.

23. The defense decided not to call movant as a witness at trial after the suppression hearing.

24. On cross-examination Mr. Constantinou said that there were no medical records which supported movant's contention that he had been struck ten to twenty times. Ms. Moenckmeier said that

movant's mother told them he had no injuries prior to his "being taken into custody by the police," that the "booking records" indicated injuries at the time of "booking," (Motion Tr. 413) and that the defense wanted to show that he sustained injuries in police custody.

25. In regard to Claim XVI, Mr. Constantinou said initially that he was not aware of the substance of what Dr. Caldwell would have said, and it was later pointed out that the defense had tried to call the witness but that the Court had excluded the testimony.

26. When asked why he did not seek a change of venue Mr. constantinou said that the two venues that would give the defense the best chance were Kansas City and St. Louis, that the people in metropolitan areas "have an armor" against murder cases, and that such cases do not get much consideration. A change of venue is random and it would have been possible to end up in a "country county" which would have been "horrible" from a defense standpoint in this case. Mr. Constantinou felt that St. Louis was the best venue to get a fair trial.

27. Mr. Constantinou said that Robbie Asbridge was not called because the defense thought that this witness would not be helpful. He could not remember the reasons for this decision.

28. The defense did not call Cedrick Richardson as a witness because the witness was unwilling or unavailable; Mr. Constantinou could not remember the exact reason.

29. The defense thought the testimony of Barbara Delong would have done more harm than good.

30. Constantinou had no recollection of Doreen Stewart.

31. Mr. Constantinou said in regard to the mitigating circumstance that the defendant was not the primary actor, it would not have been practical unless movant took the stand and testified himself; the other evidence pointed at movant as a primary actor.

32. Moenckmeier said that she could not recall why Dr. Nash, Evelyn Harris, Ken Woods and Julius Williams were not called at the penalty phase.

33. Dr. Pat Fleming, a clinical psychologist, testified on behalf of movant. She had reviewed police records, the transcript, school records, and a social history. She also interviewed movant and administered a battery of tests. She concluded that movant suffers from a dependent personality disorder and attention deficit disorder, that such persons are typically followers rather than leaders, and do not typically initiate actions. She said such a person would do well in a structured environment but lacks the capacity to be a leader.

34. Marie Clark, a therapist and Director at the Behavioral Science Institute with a Bachelors and Masters degree in psychology and experience working in correctional institutions, testified. Ms. Clark was retained in this case in August 1993 to conduct an extensive social history which entailed reviewing movant's medical records, previous psychological evaluations, prior criminal record, educational records, psychiatric records of movant's father, and the trial transcript. Additionally Ms. Clark interviewed movant, movant's family members, friends neighbors and therapists.

This material was offered for the limited purpose of establishing the basis for her opinion, not for proof of the truth of the various material, as well as to show testimony which would have been relevant at the mitigation phase of the trial in areas of social development and character. Ms. Clark noted that movant's biological father was diagnosed as a paranoid schizophrenic, and that while he left the home when movant was two years of age, the cycle of violence he started in the home carried over to movant who was raised and disciplined by his older brothers because his mother's work often kept her out of the home. The brothers disciplined movant by spanking him. Movant's school records reflected that he had difficulty concentrating and staying awake because he attended church and ate dinner late at night, and that he had difficulty in reading and math. Ms. Clark opined that movant was passive, a follower rather than a leader, who tried to find ways of pleasing others and fit in, not a decision maker and was unable to assess situations sufficiently to know when he should be angry and that he did not develop a social peer group because his mother sheltered him because of his psychological problems. Her ultimate opinion was that he appeared to be a passive follower who would look to an older person for guidance because he had no social peer group or place to fit in.

Ms. Clark noted that movant had attention deficit disorder, for which he was last given Ritalin at age 12, which disorder was commonly characterized as associated with depression, low self esteem, and difficulty forming peer groups. She testified that it was not surprising that movant associated with Marlin Gray who was five years older and more outgoing than movant. When asked why

she believed movant had committed the murders she testified that she did not know if she had such an opinion but was able to say movant was a follower and that the thrust of her report was that movant was passive, shy, and needed the approval of others. Clark did not say movant was unable to distinguish between right and wrong. She opined that Clemons did not fit the pattern of a rapist because he lacked a history of anti-social or aggressive behavior.

35. Mary Ann Marxkors, an attorney retained to work on the Clemons trial, testified at the hearing. Ms. Marxkors's practice is concentrated in the criminal defense area. Ms. Marxkors was originally contacted by movant's mother, Vera Thomas, at a meeting of the Coalition Against the Death Penalty. Ms. Thomas expressed concern about what was being done on movant's case; that she did not understand the penalty phase and that attorney Moenckmeier had moved to California while the case was being prepared. Ms. Marxkors later met with Mr. Constantinou and Ms. Moenckmeier to discuss what needed to be done. Ms. Marxkors was hired initially to work on the pretrial motions and investigation for mitigation in the penalty phase if that proved necessary. She did not enter her appearance in the case, but was hired in approximately mid-December prior to the January trial setting to do work in areas Ms. Moenckmeier lacked experience in. After reviewing the records Ms. Marxkors believed that the mental health areas should be explored for purposes of mitigation and waiver of rights and so advised movant's attorneys. The attorneys expressed concern about the proximity of the trial and the lack of funds. She furnished information to a psychologist and educational specialist at Washington University and drafted a motion for funds with their

affidavits under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct 1087, 84 L.Ed. 53 (1985). Additionally she attempted to obtain more complete copies of the material sought in discovery. Ms. Marxkors testified that the attorneys characterized their strategy at the initial meeting as attempting to rile and have the jury hate the prosecuting attorney. She did not believe they should rely on this strategy. She testified as to difficulty in obtaining all school and medical records within the available time period.

36. Cedric Artisse Richardson testified that he knew Clemons from "staying" in the same neighborhood. Mr. Richardson testified that the police came to the house of his grandmother Irene Ramsey to talk to him, asked if he knew Clemons and took him with them to Clemons house. He testified that he rode with Clemons to the police station for questioning, at which time Clemons appeared calm and had no apparent bruises or bloody lip. Mr. Richardson and movant were questioned separately and when Richardson saw movant approximately thirty minutes after they were separated the right side of face was bruised and puffy. He characterized movant as quiet except when talking to females.

Cedric Richardson is the brother of one of movant's co-defendants and a personal friend of movant. The Court finds his testimony here was not credible, in large part because of these relationships.

37. Dr. Caldwell, a physician with experience in sports medicine and particularly boxing, who was an AAU sanctioned ringside physician for a time, and who also fought himself, testified for movant. Dr. Caldwell said that he had extensive experience

dealing with head injuries to people of all ages during his time as an emergency room physician and while treating boxers. Dr. Caldwell stated that he was initially consulted by movant's trial attorneys in late 1991 or early 1992. He was provided with hospital records and transcripts of interviews of movant during his questioning by the police. He was not given any photographs by movant's attorneys. His opinion at that time, which was communicated to movant's attorneys, was that movant had sustained soft tissue injuries to the right side of face, on the right cheek and right side of his mouth. Dr. Caldwell was not provided with any information from which he could determine the time of the injuries, only that movant was transported to the emergency room while in the custody of law enforcement personnel. Dr. Caldwell said that he was ready and willing to testify, that he had gone to court on the scheduled date and was present in the courtroom, and that movant's attorneys told him he could leave because he would not be called to testify. He could not recall the reason given by the attorneys; he remembered only that they had discussed the matter and had given him a reason.

Dr. Caldwell was contacted by movant's attorneys in the present cause in early 1995. At that time he was given the same information he had been given earlier as well as photographs and a transcript of movant's testimony at a pretrial hearing. He said that the photographs were consistent with the injuries in the hospital report, but that the photographs revealed swelling to the forehead that was not indicated in the hospital report. The doctor said that the injuries were consistent with those he had inflicted as a fighter and that, as a medical opinion, they were consistent with some type

of blunt trauma. He did not have enough information to know what the trauma was, but he said on redirect that the injuries were consistent with movant's statement that his head had been hit against a wall. The doctor said that with this kind of trauma one would expect to get swelling with no bruising. In regard to chest injuries reported by movant, the doctor said that the chest wall is collapsible and that blows to the chest will not necessarily result in a physical manifestation.

When shown photographs taken four years later at the penitentiary, the doctor said that the swelling to the forehead was not present, there was a reduction in the prominence of the right cheek, and there was decreased swelling at the corner of the mouth.

38. Donald Cross testified that he is a clinical psychologist with extensive experience evaluating children with attention deficit disorder. This disorder is a psycho-neurological disorder marked by lack of concentration, disruptive behavior, and low motivation. The doctor also testified that children with attention deficit disorder can suffer from mild to moderate depression due to negative feedback given to the child as a result of behavioral problems associated with the disorder.

Dr. Cross testified that he was contacted by movant's mother concerning evaluating movant. Dr. Cross believed this contact was made during the time of the trial. He testified that, although he agreed to evaluate movant, he was not contacted by the defense attorneys.

The next time anyone contacted Dr. Cross on movant's behalf as in July or August of 1995. At the request of movant's current counsel, Dr. Cross agreed to perform a psychological evaluation of movant. Based on this evaluation, Dr. Cross diagnosed movant as suffering from a personality disorder - not otherwise specified, as classified by DSM-IV. Dr. Cross also testified that movant has an average IQ, but has attention deficit disorder, learning disability, poor self-esteem, and depression marked by low motivation and poor self-concept.

39. Vera Thomas, movant's mother, recounted difficulties movant faced with illness and attention deficit disorder during his school years, but testified that he completed a trade skill program. Mrs. Thomas testified that she spent many hours, including evening hours, working or attending classes to better her employment prospects. She also testified concerning some turbulent occurrences in the family's home life and the strict house rules set by her former husband who was living with the family when movant was a young child. It is apparent to the Court that, despite these obstacles, Ms. Thomas is a dedicated and loving mother. She took great pains to learn the cause of movant's academic difficulties and to provide proper schooling for him.

Ms. Thomas testified that the police picked up movant at home. She stated that movant's physical appearance was normal at that time, but that at his arraignment, the right side of his face was swollen and he was wearing a shirt she did not recognize.

Ms. Thomas further testified that she retained Bob Constantinou and Jeanene Moenckmeier to serve as trial counsel.

Moenckmeier was to conduct the pretrial research, and Constantinou was to conduct the trial. Ms. Thomas indicated that she agreed to pay counsel a fee of $20,000, with counsel to be responsible for investigation costs, and with Ms. Thomas remaining responsible for subpoena and deposition costs. Ms. Thomas identified a number of criticisms of trial counsel, including: failure to communicate concerning the case; failure to apprise Ms. Thomas that Moenckmeier was moving to California; failure to conduct investigation; advising Ms. Thomas to conduct witness interviews and investigation on her own; failure to apprise Ms. Thomas that there would be a penalty phase at trial; failure to follow up Ms. Thomas' initial contact with Dr. Cross and conduct other interviews or investigation of several persons, including Martha Jaeger, Skip Nilges, Daniel Winfrey, Michael Chapey, Dr. Renard Caldwell, Michael Kent, Robbie Asbridge, Tony Dorsey, Cedric Richardson and a police tape made of Richardson's interrogation, Sharon Gully and Marcella Boyd. Ms. Thomas further testified that she hired independent investigators, including Audrey O'Brien, who investigated ownership of the Chain of Rocks Bridge, as it might relate to jurisdiction over the crimes; and Randy Tillman, an investigator in Scott County hired to investigate the circumstances of the area where the body was found. Ms. Thomas further indicated that she wanted defense counsel to work with a DNA testing lab to examine a condom found at the crime scene, but Ms. Moenckmeier did not provide much response. Likewise, Ms. Thomas testified that Mr. Constantinou never agreed or refused when she asked him to investigate the bridge, and that counsel did not honor her request to interview the individual who found the

body. Overall, Ms. Thomas complained of severe communication problems between the defense team, who apparently were divorced.

40. Robbie Asbridge, an inmate at the penitentiary in Jefferson City, testified that he knew movant when they were both incarcerated in the city jail. Mr. Asbridge said that he had an altercation with movant in the jail which he, not movant, instigated because he had just had an altercation with another inmate. Mr. Asbridge said that he had been on the same tier as movant for one night and day, and that otherwise they occasionally saw each other when going to see a doctor or dentist. Mr. Asbridge said that it appeared movant got along well with others, and that he had never been contacted by the defense prior to movant's trial.

41. Michael Chapey was summoned as a witness by movant at the hearing. This Court ruled that his testimony would be irrelevant to the issues, particularly considering the Court's own observations of the efforts made by movant's trial attorneys in arguing vehemently and attempting to get him to testify at trial.

42. Fabian Sickles, Jr. was called as a witness in order to lay a foundation for certain photographs that were admitted into evidence for the purpose of showing swelling to the right side of movant's face, and comparing such photographs with photographs taken by Mr. Sickles four years later at the Potosi Correctional Center. The Court thereafter ruled that the photographs would be admitted into evidence.

43. Martha Jaegers testified that she teaches a G.E.D. class at the St. Louis Medium Security Institution; that Daniel Winfrey and

Luis Vega were in the same class; that she would not have remembered that had she not looked at the records from M.S.I. She stated that there were about fifteen to twenty students in the class. She said that she did not recognize the name Michael Chapey, and that she had never been contacted by the defense prior to movant's trial.

44. Arvon Clemons, movant's older brother, testified that their natural father had been physically abusive, that he had been afraid of his father, and that movant had been present and had observed abusive treatment of his siblings. Mr. Clemons also testified that after their father was no longer present, he and other older siblings disciplined movant while their mother was away from the house at school, and that he never saw movant in a fight.

45. Roland Dorsey testified for movant at the hearing. Mr. Dorsey said that he had known movant for 12 or 13 years, that he had lived across the street from movant, they had been friends and that they spent a lot of time together. Mr. Dorsey said that he was older than movant and that he had taken movant "under my wing" because other kids picked on movant. He said that movant got along with everyone, that he could not do much on his own, that movant had a girl-friend he got along with, and that movant had a lot of friends.

46. Buffie Garnett testified that she had known movant since he was a child. She lived diagonally across the street from the house movant lived in and she had known him about 17 years on a personal basis. She said they hung out with other kids on the street, that they played football, softball, and would walk to the

store. She said that she had been his girl-friend for a couple of months when she was thirteen. She had never been contacted by defense counsel.

47. Maureen Garnett, Buffie Garnett's grandmother, testified that she had lived across the street from movant having moved to such location in 1973. She knew movant through her son Richard. She said that she saw movant just about everyday, mostly in the afternoon. She said that movant was not a very active, aggressive child and that he was more quiet than other kids. She had not been contacted by defense counsel,

48. Toni Dorsey, the mother of Roland Dorsey, testified that as of 1992 she had lived for fifteen years on the same street as movant. She first got to know him when he was hit in the head with a softball bat at the age of eight or nine and she tended to his injury. She said movant came over to the house almost daily, that he was a quiet, friendly child who had no problems with other kids. When movant was arrested she had seen him being brought out to the police car. She said that he had no bruises or swelling at that time. She was never contacted by defense counsel.

49. Marcella Boyd testified that she had been movant's girl-friend five years ago. She said that they met on a blind date and went out for around three months until he was arrested. She had just gotten out of an abusive relationship and did not want a sexual relationship, and she said that movant was a gentleman and was understanding in this regard.

50. Janice Johnson testified that she was a neighbor and had known movant since he was four or five years old, when movant's family moved into the neighborhood. She said that her daughter Stephanie sometimes walked to school with movant, and that he came to her house to visit her daughter. She said that she had not been contacted by defense counsel but had gone to court at the request of movant's mother who wanted her there to be a character witness.

51. Sharon Gulley testified that she had been a next door neighbor for approximately fifteen years. She said that defense counsel had not spoken with her but that movant's mother had asked her come to court, which she did. She said that she would have testified that movant was a good kid, that he loved animals, was a nice person, always pleasant and polite, and never cursed. She said that on one occasion movant had protected her nephew from a bully in the neighborhood.

52. Movant's sister Veronda Brown was called as a witness to testify. She had testified at both the guilt and penalty phases of movant's trial, and the Court ruled at the hearing that her testimony would not be admitted but would be taken as an offer of proof.

53. Bob Williams testified that he had made photographic services available to movant's mother. He said that movant's mother wanted photographs of the bridge, but the pictures and videotape he took were of the wrong location on the bridge.

54. Karen Fogarty, an educational specialist, was contacted by Vera Thomas. Karen Fogarty testified that Vera Thomas asked her

to testify at trial. She said that she wrote a consultation report in April 1990 in which she recommended goals for movant such as managing his time and focusing his attention. She suggested programs to increase his concentration and recommended that supervision of his schooling be increased. She said that she sent a copy of the report to movant's attorney and was never contacted.

55. Lieutenant Delores Elam worked at the City jail in 1992, and she testified in regard to the incident between movant and Mr. Asbridge on September 4, 1992. She said that she spoke to both participants, and movant declined to give a statement. She said that Mr. Asbridge told her movant hit him in a dispute over a radio, and that Asbridge hit his head on the table resulting in bleeding. She said movant was disciplined with ten days in segregation and with all of his privileges being taken away.

56. Timothy Leonberger, a clinical psychologist who is experienced in evaluating and treating psychological disorders, testified for the State. Dr. Leonberger criticized Dr. Fleming's IQ results due to an improper calculation. Dr. Fleming should have calculated movant's full IQ to be between 97 and 118, according to Dr. Leonberger. Dr. Leonberger testified that this error in calculation was of such a magnitude as to call into question all of Dr. Fleming's results and analysis.

Dr. Leonberger further criticized Dr. Cross' diagnosis of depression, attention deficit disorder, and personality disorder, and disputed Cross' analysis of the results of the battery of tests given movant.

57. Dr. John Rabun testified as a witness for the state. Dr. Rabun is a forensic psychiatrist ac St. Louis State Hospital and he examined movant on September 11, 1995. The doctor said that movant told him he was not acting under the influence of others on the night of the crimes, he did not feel dominated, and he was not cowardly. Dr. Rabun found that movant suffers from no organic brain damage, that he found no evidence of a mental disease or defect, that movant was capable of understanding *Miranda* warnings, and that he was competent at the time of his trial. The doctor diagnosed movant as having a learning disorder not otherwise specified, and that the evidence was conflicting as to whether he suffered from attention deficit disorder. The doctor found no evidence of a dependent personality disorder, no indication that movant had been acting under the influence of an emotional disturbance the doctor said that movant was overall bright and intelligent, has good short and long term memory, and that movant had denied suffering from depression prior to his commitment to death row. On cross-examination, the doctor said that he based his conclusions on the materials he had been given by the prosecutor[7] as well as his own examination; he had not been given evidence regarding the swelling to movant's face and his contention that he had been beaten by the police; he also had not been given the complete police file.

58. Movant was given the opportunity to testify by deposition as provided or in Rule 29.15(i), but has failed to do so.

---

7. These materials included police reports, school and hospital records.

CONCLUSIONS OF LAW

_____1. In Claim I movant argues that Instructions nos. 6 and 13 were improper in that they allowed the jury to find movant guilty of first degree murder without first finding that he personally deliberated, citing State v. Bell, 854 S.W.2d 612 (Mo.App.E.D. 1993). Further, that trial counsel's failure to specifically object to the erroneous instructions was ineffective assistance of course, even though Bell had not been decided at the time of the trial in the instant case in that the plain reading of § 565.020 RSMo clearly indicates that a person commits the crime of first degree murder if he knowingly causes the death of another person after deliberation. Therefore, even without Bell, trial counsel should have made a specific objection.

As a general rule allegations of instructional error are trial error, even where ineffectiveness of counsel is alleged. Turner v. State, 765 S.W.2d 708, 730 (Mo.App. 1989). The Court further finds that the allegation is without merit. See MAI-CR 3d 304.04 pp. 304-30 and 304-31. The instruction here is virtually identical to the instruction found to be proper in State v. Isa, 850 S.W.2d 876, 897-899 (Mo.banc 1993). The instructions given at movant's trial did not suffer the same defect found in Bell and State v. Ferguson, 887 S.W.2d 585 (Mo.banc 1994), in that paragraph fourth in the instant case required a finding that movant "reflected on the matter coolly and fully" which language was not in the instruction found to be defective in Ferguson and Bell.

2. Movant's second Claim is that his attorney filed a motion indicating that movant was indigent, that the motion was denied,

and his attorney was ineffective both for failing to make a record in regard to the denial of the motion and was ineffective for entering into a contract with movant's parents who apparently were only able to pay approximately $19,000. No evidence was presented at the hearing which specifically dealt with the ability of either movant or his parents to pay for private counsel. The evidence presented at the hearing showed that expert witnesses were consulted, that a decision was made not to use them because of the possibility that they would do more harm than good, and the evidence presented at the hearing failed to support the claim that movant's capacity to appreciate the criminality of his conduct was impaired or that he had acted under the influence of mental or emotional disturbance.

3. Claim III is that movant's attorney was ineffective for failing to call witnesses at the penalty phase. Movant alleges that his attorney either directly or through an investigator met with him only six times; that due to a lack of funds defense counsel called only friends and family members at the penalty phase; and that his attorney should have called other witnesses and investigated medical, psychiatric and educational records.

Counsel's presentation of the penalty phase is a matter of professional judgment. Antwine v. State, 791 S.W.2d 403, 407 (Mo.banc 1990), cert. denied 112 L.Ed.2d 789 (1991). There is no absolute duty to present mitigating character evidence. Clemons v. State, 785 S.W.2d 524, 528 (Mo.banc 1990); Jones v. State, 767 S.W.2d 41, 43 (Mo.banc 1989). Counsel is not required to present a defendant's background in mitigation in a death penalty case.

Schneider v. State, 787 S.W.2d 718, 721 [5] (Mo.banc 1990), cert. denied 498 U.S. 882 (1990). A lawyer's election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness. Walls v. State, 779 S.W.2d 560, 562 (Mo.banc 1989), cert. denied 494 U.S. 1060, 108 L.Ed.2d 777 (1990); Antwine v. State, 791 S.W.2d 403, 407 (Mo.banc 1990), cert. denied 112 L.Ed.2d 789 (1991).

The Court notes that defense counsel did call eighteen witnesses at the penalty phase of movant's trial including family members, relatives, friends, two ministers and a school teacher. The testimony offered at the hearing in this cause, Arvon Clemons, Roland Dorsey, Buffy Garnett, Maurine Garnett, Toni Dorsey, Marcella Boyd, Janice Johnson, and Sharon Gulley, was cumulative to that offered at trial. The Court further notes that health and mental health professionals were consulted and considered, and that a decision was made not to use such evidence because it would have been harmful to the defense.

4. Claim IV is that the prosecutor, Nels Moss, made several improper statements during closing arguments at both the guilt and penalty phases, often without objection by defense counsel.

As a general rule prosecutorial misconduct is not cognizable in this proceeding. See, State v. Adams, 791 S.W.2d 761, 765 (Mo.App. 1990); State v. White, 790 S.W.2d 467, 474 (Mo.App. 1990); Burgin v. State, 847 S.W.2d 836, 839 (Mo.App.W.D. 1992). Where the allegation is failure to object, Movant must show that an objection would have been meritorious and that the failure to object resulted in a substantial deprivation of the right to a fair trial. Ruff

v. State, 815 S.W.2d 460, 465 (Mo.App. 1991). Failure to object during closing argument is more likely a function of trial strategy than of error. See, State v. Boyd, 844 S.W.2d 524, 529 (Mo.App. 1992). Even if movant's attorney should have objected, the court must find a basis to conclude that absent counsel's failure to object the jury would have had a reasonable doubt concerning movant's guilt. State v. Durbin, 835 S.W.2d 323, 326 (Mo.App. 1992).

The Court notes that defense counsel objected to the majority of the arguments set forth in subpart A, and thus this allegation is one of trial error that is not cognizable in this proceeding. As to the one unobjected to argument at page 3628, the Court notes that even if the argument was improper, it was a brief comment and when considered in immediate context in which it was made could not have had a prejudicial impact; the argument at that point was in regard to the loss to the family and not an argument about vigilantism.

The argument in subpart 3 was not improper, and defense counsel did object to the first part of the argument. See, State v. Carson, 883 S.W.2d 534 (Mo.App.E.D. 1994); State v. Moorehead, 875 S.W.2d 919, 918 (Mo.App.E.D. 1994); State v. Hughes, No. 63015 (Mo.App.E.D. September 5, 1995).

The comments in subpart C were commence on the evidence, and the reference to the prosecutor's children was a brief comment made in response to a statement by defense counsel.

Movant alleges in subpart D that the prosecutor introduced and argued improper victim impact evidence. The use of such evidence

is improper only if it renders the trial fundamentally unfair. See, State v. Wise, 879 S.W.2d 494, 515-516 (Mo.banc 1994); State v. Parker, 886 S.W.2d 908, 926-927 (Mo.banc 1994).

The argument here was not improper.

Movant alleges in subpart E that the prosecutor made an improper reference to movant's failure to testify. This allegation is without merit. State v. Brittain, 895 S.W.2d 295, 299-300 (Mo.App.E.D. 1995); State v Dunn, 889 S.W.2d 65, 72-73 (Mo.App.E.D. 1994).

Movant alleges in subpart F that the prosecuting attorney made improper religious references during his closing argument. The only reference during the guilt phase that was not objected to was a brief comment which, when considered in its context, could not have been prejudicial. (Tr. 3259). Movant's contention as to those instances where he did object, trial counsel failed to preserve the issue for appeal, is not cognizable in this proceeding. State v. Thomas, 830 S.W.2d 546, 552 n. 9 (Mo.App. 1992); Kirk v. State, 778 S.W.2d 661 (Mo.App. 1989). The Court has reviewed the statements made during the closing argument portion of the penalty phase and finds that they could not have caused movant to suffer a substantial deprivation of his right to a fair trial. See, State v. Whitfield, 337 S.W.2d 503, 513 (Mo.banc 1992) (a reference to the scripture was troubling but not plain error). These comments were also in part a response to statements made by defense counsel.

Movant alleges in subpart G that the prosecutor misstated the law in his argument and made no mention of intent or deliberation.

The Court has reviewed the argument and finds that the prosecutor did argue that the jury must find intent and deliberation. (Tr. 3238-3248).

Movant contends in subpart H that the prosecutor improperly argued that the presumption of innocence was dispelled prior to the start of jury deliberations. This allegation is without merit. State v. Sanders, 903 S.W.2d 234, 239 (Mo.App.E.D. 1995); State v. Blakeburn, 859 S.W.2d 170, 175 (Mo.App.W.D. 1993).

Movant alleges in subpart I of Claim IV that his attorney was ineffective for failing to object when the prosecutor made a disparaging reference to Melvin Leroy Tyler. Movant's trial counsel did not get the impression that the prosecutor was referring to perjured testimony, and movant's counsel was therefore not ineffective. It should be noted that a Court may consider the fact that movant consulted Melvin Leroy Tyler on the issue of movant's credibility. Easton v. State, 765 S.W.2d 661, 662 (Mo.App. 1989).

Movant alleges in subpart J that his attorney was ineffective for failing to object to the prosecutor's statement that, "the law says we use Mr. Clemons's statement here. What anybody else said involved in this thing is not relevant and we can't bring it in." Movant could not have suffered prejudice here because the substance of any ocher statements was not referred to.

Movant alleges in subpart K, that his attorney was ineffective for failing to object to a statement regarding movant's lack of remorse. Any objection would have been without merit. See, State

v. Preston, 673 S.W.2d 1, 11 (Mo.banc 1984); State v. Feltroo, 803 S.W.2d 1, 17 (Mo.banc 1991).

Movant alleges his attorney was ineffective for failing to object to a statement which consisted of speculation as to what the victims' family and friends would consider an appropriate punishment. Movant has cited no controlling authority on this point, the comment was clearly the prosecutor's own speculation, and the comment was in response to a statement made by defense counsel (Tr. 3610).

Movant contends in subpart M that his counsel was ineffective for failing to object to a statement regarding deterrence. Deterrence is a proper consideration in the decision whether to impose the death penalty. The cases cited by movant are not relevant because the statement of law regarded guilt or innocence, not the appropriate punishment.

Subpart N regarding dependent care or jurors was withdrawn at the hearing.

5. Claim V is a claim that inadmissible evidence was presented over the objection of movant's attorney and that movant's attorney then failed to preserve the issue for appeal. The first part of this allegation is an allegation of trial error that is not cognizable in this proceeding; the second part, failure to preserve a ground for appeal, is likewise not cognizable under Rule 29.15. State v. Thomas, 830 S.W.2d 546, 552 n. 9 (Mo.App. 1992); Kirk v. State, 778 S.W.2d 661 (Mo.App. 1989); State v. Baker, 850 S.W.2d 944, 950 (Mo.App.E.D. 1993).

6. Claim VI is that movant's attorney failed to object to the alleged misconduct of the prosecutor during the cross-examination of a witness, and that movant's attorney failed to preserve for appeal certain other questions that were objected to. The Court has reviewed the transcript and finds that the statements on pages 2814 to 2817 were in response to the direct examination of the witness or were based on other evidence in the case (Tr. 2325-2331). The statements made at pages 2895-2902 were properly objected to; the alleged error is a failure to preserve the ground for appeal which is not cognizable in this proceeding.

7. Claim VII consists of allegations relating to voir dire. Subpart A is that the prosecutor engaged in misconduct during voir dire and that movant's counsel was ineffective for failing to object. Subpart A(1) does not entitle movant to relief because the question that vas asked was neutral as to the effect of age.

Subpart A(2) does not entitle movant to relief for the reason that the jury was instructed to disregard the comment, and further because the comment did not regard movant's right to remain silent but regarded whether any of the defendants were willing to testify against each other.

Subpart B is that movant's attorney was ineffective for waiving movant's right to be present during part of the voir dire without having movant waive the right personally on the record. Movant presented no evidence in support of this ground, and the Court finds there could have been no prejudice because the only issue being discussed was jurors with hardship reasons why they could not

serve. Movant has not alleged that any of these persons were improperly excused.

Subpart C is that movant failed to object to improper definitions of "reasonable doubt" by the prosecutor. The first statement, that reasonable doubt does not mean exclusion of all doubt, is not an incorrect statement. The second statement was objected to and the objection was sustained.

Subpart D is that movant's counsel failed to remove three jurors for cause. Movant concedes that two of them were removed through peremptory challenges and therefore he is entitled to no relief as to those two. Contrary to the assertion of movant's counsel, the 1993 amendment to § 494.480 does apply to cases in which jury selection was completed prior to its effective date.

See, State v. Rush, 872 S.W.2d 127, 128 (Mo.App.E.D. 1994); State v. Bovd, 871 S.W.2d 23 (Mo.App.E.D. 1993); State v. Simmon, 865 S.W.2d 893 (Mo.App.E.D. 1993); State v. Potter , 869 S.W.2d 182, 183 (Mo.App.E.D. 1993); State v. Wings, 867 S.W.2d 607, 608-609 (Mo.App.E.D. 1993). It should also be noted that the loss of a peremptory challenge alone is not of a federal constitutional dimension. Ross v. Oklahoma, 487 U.S. 81, 101 L.Ed.2d 80 (1988); State v. Treadway, 809 S.W.2d 58, 61 (Mo.App. 1991). The remaining juror, Jerry Higgins, said that he could give movant a fair trial and that he understood the presumption of innocence. His testimony that "whoever did it, they was going to kill him" has been mischaracterized in the motion. Mr. Higgins was not stating his opinion that whoever committed the crime should automatically receive the death penalty but rather that

he had made the statement, when he first heard of the crime, and it was a belief that the State would seek the death penalty for whoever committed the crime. After reviewing all of Mr. Higgins responses, it is apparent that Mr. Higgins could not have been stricken for cause.

Subpart E alleges that trial counsel was ineffective by failing to request that venirepersons be questioned individually and outside of the hearing of the other panel members regarding any opinions or preconceived notions they may have formed from their exposure to pre-trial publicity.

The death qualification and publicity portion of the voir dire was conducted in groups of eighteen (Tr. 245), trial counsel had, by pre-trial motion, requested that prospective jurors be questioned individually, for among other reasons, to avoid the possibility that a response might "poison the panel." The Court denied the motion and stated, "And with respect to the effect it would have on the others, hopefully we can again qualify this jury on the basis that they will put aside anything other than their common sense, the evidence that they will hear from the witness stand and the law as the court gives it." (Tr. 13-14).

Those chosen in the instant case agreed to do so either by specific response or by their oath.

The Court has reviewed the transcript and does not find sufficient basis to support the prejudice alleged in the motion. See, pages 849-852. Note also that movant has mischaracterized the comments of Mr. Thompson who said he would be inclined to

believe police officers, not that they "always do their job correctly and that their credibility was without question." See Amended Motion page 156 and transcript 1086. Mr. Shy stated that he had some familiarity with the crime scene and that it was a horrible crime, but further stated that he did not have any idea whether movant committed the crime. "I don't even know if he was there. I don't know anything about it." Tr. 985-986. At this point further questioning occurred out of the hearing of the other panel members. The Court concludes that the other panel members could not have been tainted by the exchange here.

Subpart F is that the prosecutor engaged in misconduct. This ground is a ground for direct appeal and is not cognizable in this proceeding.

Subpart G is that movant's counsel failed to voir dire the jury as to victim impact evidence. This is an allegation relating to trial strategy. Movant suggests that trial counsel should have questioned potential jurors as to what effect the "victim impact evidence" would have on them. This is an allegation relating to, among other things, trial strategy. Movant claims that a reasonably competent attorney, under the existing circumstances would have speculated as to what the victim impact evidence would be based upon that presented at the trial of his co-defendant Marlin Gray and would have published this information to the panel. Bearing in mind that this was a bifurcated trial, with the jury being asked to consider guilt or innocence first, movant's suggestions would be imprudent if not impermissible.

Subpart H is that movant's counsel failed to conduct a proper Batson challenge. Although movant alleges that the initial motion was rambling and incoherent, a hearing was held at which the prosecutor was required to give reasons and the Court accepted the reasons. Movant further alleges that the reasons were pretextual, that his counsel was ineffective for failing to rebut the reasons, and that similarly situated white persons were not stricken. The Court has reviewed the transcript and finds that the prosecutor's explanation as to Mattie Clark was race neutral, see Purkett v. Eam, 514 U.S. _____ (1995), and movant did not rebut the prosecutor's explanation and movant has not offered any rebuttal for the explanation that Ms. Clark had a daughter who was a member of the Public Defender's Office. The prosecutor's explanation for juror Williams was likewise race neutral. Ms. Weaver, who movant alleges was similarly situated, was a medical secretary and billing coordinator; this position is not comparable to a nurse or medical lab technician and there is no basis for a finding that she would have the superior medical knowledge which was the basis for striking Ms. Williams. The explanations offered for striking Marion Baker and Doris Green were race neutral, and the prosecutor attempted to strike Ms. Baker for cause. Movant also alleges his attorney was ineffective for failing to preserve the Batson claim for appeal. Failure to preserve a Batson challenge for review is not cognizable under Rule 29.15 because the alleged error does not affect the fairness of the trial. State v. Harris, No. 65013 & 67389 slip op. at 7 (Mo.App.E.D. November 7, 1995).

Subpart I is that movant's counsel was ineffective for failing to object to the removal or jurors opposed to the death penalty on

religious grounds. Death qualification voir dire necessarily permits exploration of whether the venirepersons can consider the full range of punishment under the facts alleged in the case before them. Leisure, 749 S.W.2d at 373. It is within the trial court's discretion to permit such inquiry. State v. McMillin, 783 S.W.2d 82. 92 (Mo.banc 1990). It's permissible to remove jurors whose views would prevent or impair the performance of their duties as jurors in accordance with the instructions and their oaths. McMillin, at 94.

Subpart J is that movant's attorney was ineffective for failing to object to the death qualification of the jury by the prosecutor. Movant alleges that questions such as "would you vote" or "would you assess" constitute an impermissible inquiry. However, the Supreme Court has held that a prosecutor's use of the words "will you be able to," "can you," "could you," and, even, "will you," have been held acceptable on voir dire. McMillin, at 92; State v. Leisure, 749 S.W.2d 366, 373 (Mo.banc 1988).

Subpart K is that movant's attorney ineffectively attempted to rehabilitate jurors stricken during death qualification. This is a matter of trial strategy, movant has mischaracterized the nature of the questions asked by movant's attorney, and an attempt at rehabilitation puts counsel in the position of urging the venire members to follow the law and impose the death penalty. Even assuming the jurors could have been rehabilitated, the movant has not alleged facts which suggest that the failure to do so resulted in the genuine deprivation of a fair trial.

Subpart L is that movant's attorney was ineffective for failing to make a motion to strike the panel because the prosecutor used all

of his strikes to remove women. Neither the United States nor the Missouri Supreme Court had held that Batson applied to gender based strikes at the time of movant's trial. See, State v. Pullen, 843 S.W.2d 60 (Mo.banc 1992) and State v. Parker, 836 S.W.2d 930 (Mo.banc 1992). J.E.B. v. Alabama, 511 U.S._ (1994) was not decided until after movant's trial. An attorney's conduct is determined by what the law is considered at the time of trial. Counsel is not ineffective for not anticipating a change in the law. State v. Parker, 886 S.W.2d 908, 923 (Mo.banc 1994); Hawkins v. State, 854 S.W.2d 606 (Mo.App.S.D. 1993). The allegation that movant's counsel was ineffective for failing to make a record in the event the law should change while his case is on direct appeal is not cognizable in this proceeding.

Subpart M is that movant's attorney failed to object to the prosecutor's misstatements of the law regarding "acting with another." The prejudice is that otherwise qualified jurors were stricken during the death qualification. The Court has reviewed this portion of the transcript and finds that the questioning did not constitute erroneous accomplice liability statements, that the jurors were not asked for a commitment, and that the questions were appropriate.

Subpart N is that movant's attorney failed to renew a motion to include dependent care for potential jurors and that the issue was therefore not preserved for appeal. This issue was abandoned at the hearing, and the allegation is without merit and not cognizable in this proceeding. See, McMillin at 93; State v. Whitfield, 837 S.W.2d 503, 510 (Mo. 1992).

Subpart O is that movant's attorney was ineffective for asking potential jurors whether they could vote for the death penalty if the court so instructed because the question implies that the death penalty is mandatory under certain circumstances. This allegation is a misinterpretation of the questions, assumes that a question whether someone could vote a certain way implies that they must vote that way, and assumes the jurors would disregard or misinterpret the jury instructions.

Subpart P is that movant's counsel objected to certain strikes, that the motions were overruled and that movant's counsel thereafter failed to preserve the grounds for appeal. This ground is not cognizable in this proceeding.

8. Claim VIII alleges that defense counsel was ineffective for failing to call Martha Jaeger to rebut the testimony of Daniel Winfrey concerning whether or not he knew Luis Vega during their incarceration at the St. Louis Medium Security Institution.

All Ms. Jaeger could state was that they were in the same G.E.D. class of about fifteen to twenty inmates at M.S.I. Winfrey was never asked and never denied that Vega was in his G.E.D. class, only that he did not know him and never confided in him. (Tr. 2074-2082; 2127; 3151-3155).

In addition, even if the allegation was true, it would not entitle movant to relief. State v. Day, 859 S.W.2d 194, 196 (Mo.App.E.D. 1993); State v. Ray, 852 S.W.2d 165, 172 (Mo.App.S.D. 1993); State v. Roe, 845 S.W.2d 601 (Mo.App. 1992); State v. Hutton, 825 S.W.2d 883, 890 (Mo.App. 1992); State v. Askew, 822 S.W.2d

497, 503-504 (Mo.App. 1991); Lane v. State, 778 S.W.2d 769, 771 (Mo.App. 1989). In regard to the crossexamination, the testimony of Mr. Constantinou at the evidentiary hearing established that this was a matter of trial strategy.

Movant also alleges he suffered prejudice by the failure of Mr. Chapey to testify. The Court finds that movant's trial counsel were not ineffective in their attempts to put on the testimony of this witness.

9. Claim IX is that movant's counsel was ineffective for attempting to destroy the credibility of a prosecution witness in a manner that inflamed the passions of the jury. This allegation was abandoned at the hearing, and would be without merit in any event for the reason that the extent of cross-examination is almost always a matter of trial strategy. Cole v. State, 573 S.W.2d 397, 403 (Mo.App. 1978). See also, Thomas v. State, 761 S.W.2d 246, 252 (Mo.App. 1988); Swearingin v. State, 629 S.W.2d 560, 563 (Mo.App. 1981). The impeachment of a witness is a matter of technique and strategy and cannot be the basis of a breach of duty towards the movant. Davis v. State, 748 S.W.2d 698, 700 (Mo.App. 1988).

10. Claim X is that movant's counsel was ineffective for failing to object to the prosecutor's questioning of a prosecution witness by the use of leading questions and to preserve the ground for appeal. This allegation was abandoned at the hearing.

11. Claim XI is that movant's counsel was ineffective for failing to call impeachment witnesses. This allegation was abandoned at the evidentiary hearing.

12. Claim XII is that movant's attorney was ineffective for failing to object to certain conduct of the prosecutor. No evidence was offered at the evidentiary hearing in regard to the drawing, and movant could have suffered no prejudice because Mr. Swyers (commencing at page 159) and Officer Kroek (commencing at page 1983) testified as to the preparation and accuracy of the drawing. The underlying theme of this claim seems to be based on the theory of prosecutorial misconduct, which, as the Court has previously stated, is not the proper subject for a Rule 29.15 motion. Further, it is noted that defense counsel did object on numerous occasions. Mr. Constantinou testified that he had objected, and that he did not raise the issue in the new trial motion because he did not think it was sufficiently prejudicial.

13. Claim XIII is that movant's counsel called an expert witness to rebut the State's expert, and that the rebuttal witness was discredited. This allegation was abandoned at the hearing.

14. Claim XIV is that movant's counsel failed to sufficiently object to victim impact evidence during the guilt phase, and failed to preserve the ground for appeal. The Missouri Constitution's limitation is coextensive with the federal constitution. Under both, such evidence and argument may be relevant and admissible at the penalty phase. It only violates the constitution if it is so unduly prejudicial that it renders the trial fundamentally unfair. State v. Wise, 879 S.W.2d 494, 515-516 (Mo.banc 1994). The testimony by

Ms. McClain was objected to by defense counsel, and the objections were denied on the basis that the evidence showed why the victims were on the bridge at the time of the crimes.

15. Claim XV is that movant's counsel failed to conduct a sufficient suppression motion hearing. Specifically, movant alleges his counsel should have called Mr. Cummins who would have testified that he had been beaten by the police and that this would have supported movant's claim that he was beaten and his confession coerced. Movant's attorney attempted to introduce the transcript of Mr. Cummins' testimony from Marlin Gray's trial and it was excluded on the grounds that it was not relevant or material as to what happened to movant. This allegation does not entitle movant to relief because the same objection - lack of relevancy - would apply to the live testimony. Movant's attorney also presented movant's medical records but did not call a doctor for live testimony. This is therefore a matter of trial strategy.

16. Claim XVI is that movant's counsel endorsed a witness late, Dr. Caldwell, and as a result the witness was not permitted to testify as to movant's injuries. This witness would have provided rebuttal and impeachment evidence as to testimony by prosecution witnesses and therefore the allegation does not entitle movant to relief. Late endorsement cannot be a ground for relief given that the failure to call a rebuttal witness is not a ground for relief. The testimony also would have been cumulative to other evidence presented. Dr. Caldwell testified that he could not say when the injuries were incurred or who inflicted them.

With respect to movant's injuries, the only credible evidence presented was that, after the homicide detectives questioned him and obtained his statements, he was taken to prisoner processing for booking (approximately 2:00 a.m. on April 8, 2991).

As part of the processing procedure movant was fingerprinted and photographed. Joyce Taylor, the clerk who booked movant, stated that movant had no injuries on or about his face when he was booked. (Tr. 2644). It was not until Tuesday April 9, 1991, after spending over 24 hours in the holdover, that movant was observed to have the right side or his face swollen. (Tr. 12651267). (See Findings of Fact paragraph 24; counsel and/or movant's mother apparently confused admission to City Jail with "booking" which took place at Police Department's Prisoner Processing section.)

17. Claim XVI is that movant's attorney failed to present a rebuttal witness as to a statement by Dennis Doyle that movant stated "I did it" at a party. This allegation does not entitle movant to relief because the failure to call impeachment witnesses is not ineffective assistance, and further any prejudice was undercut by the statement of the witness that everyone present said "I did it" and that it was said as a joke. In addition, the decision not to call this witness, Barbara DeLong, was based on the conclusion that the witness would do more harm than good.

18. Claim XVIII is that movant's counsel objected to the aggravating instructions on the ground that they were not supported by the evidence but failed to preserve the ground for appeal. This allegation is not cognizable; in addition it is an allegation of insufficiency of the evidence which is also not cognizable.

19. Claim XIX is that movant's counsel was ineffective for failing to file a motion for change of venue. A decision not to seek a change of venue is a tactical decision demonstrating no incompetency unless manifestly wrong. Starr v. State, 788 S.W.2d 549 (Mo.App. 1990); Cooper v. State, 779 S.W.2d 721, 722 (Mo.App. 1989); Harris v. State, 779 S.W.2d 700 (Mo.App. 1989). The movant must prove that but for counsel's failure to request a change of venue the result of the trial would have been different. The court may find that any taint of pretrial publicity was removed during voir dire where the court dismissed all venirepersons who acknowledged they might be influenced by the publicity. Jones v. State, 824 S.W.2d 441 (Mo.App. 1991). The record in the present case establishes that the decision not to seek a change of venue was made as a matter of valid trial strategy, (see Finding of Fact q 26, page 9 of this Order) and the transcript of the voir dire indicates that the jurors before whom movant was tried were not affected by the pretrial publicity. Movant is therefore not entitled to relief. Allen v. State, 903 S.W.2d 246 (Mo.App. 1995).

20. Claim XX is that movant's counsel was ineffective for failing to call an impeachment witness regarding a disciplinary violation report used during the penalty phase. As set out above, this allegation does not constitute ineffective assistance of counsel. In addition this allegation amounts to speculation because the evidence presented was that movant had adjusted pretty well in jail, and the impeachment would have gone to only one of the two fights. Mr. Constantinou said that the witness, Robbie Asbridge, was not called because it was believed he would not be helpful, and the Court finds the testimony of Mr. Asbridge was consistent with

this opinion in that his testimony was not credible. The decision was therefore a matter of legitimate strategy.

21. Claim XXI is that movant's counsel was ineffective for failing to present evidence that the body that was found was not that of Julie Kerry. This allegation has been abandoned; no evidence was presented at the hearing in support of the allegation.

22. Claim XXII is that movant's attorney was ineffective for failing to object to the Court's reasonable doubt instruction. Challenges to MAI-CR3d 302.04, which defines reasonable doubt, have been consistently and repeatedly rejected. State v. Parker, 886 S.W.2d 908, 923 (Mo.banc 1994); State v. Hicks, 853 S.W.2d 955, 957 (Mo.App.E.D, 1993); State v. O'Brien, 857 S.W.2d 212 (Mo.banc 1993); State v. Griffin, 848 S.W.2d 464. 469 (Mo.banc 1993). Such challenges have been rejected by every Missouri appellate court. State v. Pendleton, 860 S.W.2d 807, 813 (Mo.App.E.D. 1993). The Supreme Court has further held that MAI-CR3d 302.04 meets the constitutional guidelines established in Cage v. Louisiana, 498 U.S. 39 (1990). State v. Shurn, 866 S.W.2d 447, 462 (Mo.banc 1993); State v. Griffin, 848 S.W.2d 464, 468-469 (Mo.banc 1993); State v. Nichols, 865 S.W.2d 435, 437-438 (Mo.App.E.D. 1993). See also, Victor v. Nebraska, 511 U.S. ---, 127 L.Ed.2d 583 (1994). Therefore, any objection would have been without merit.

23. Claim XXIII is that Rule 29.15 is unconstitutional because of the time limitations. The post-conviction relief remedy time constraints are valid and mandatory. Smith v. State, 798 S.W.2d 152 (Mo.banc 1990), cert. denied ____ U.S. ____, 114 L.Ed.2d 127

(1991); Day v. State, 770 S.W.2d 692, 695 (Mo.banc 1989), cert. denied sub nom., Walker v. State, 493 U.S. 866, 107 L.Ed.2d 141, 110 S.Ct. 186 (1989).

24. Claim XXIV is that the proceedings conducted pursuant to Rule 29.07(b)(4) were unconstitutional because he was not represented by counsel. The Rule 29.07(b)(4) hearing is not a critical stage of the criminal proceeding. State v. Debler, 856 S.W.2d 641, 652 (Mo.banc 1993). The Rule 29.07(b)(4) hearing does not violate movant's fifth and sixth amendment rights (against self-incrimination and to counsel) because the criminal case is over, the inquiry and response would not disclose a fact or facts constituting a link in the chain of evidence sufficient to convict movant in future criminal proceedings, and the inquiry does not provide a measure by which the effectiveness of his counsel is determined. State v. Hurtt, 836 S.W.2d 56, 61 (Mo.App.S.D. 1992). This allegation is therefore without merit.

25. Claim XXV is that Missouri's death penalty scheme is unconstitutional. This is a ground for direct appeal. The allegation is also without merit. See, State v. Whitfield, 837 S.W.2d 503 (Mo.banc 1992); State v. Shurn, 866 S.W.2d 447, 468 (Mo.banc 1993); State v. Ramsey, 864 S.W.2d 320, 330 (Mo.banc 1993) as to prosecutorial discretion; see State v. Griffin, 756 S.W.2d 475, 487 (Mo.banc 1988) as to the Court's imposition of the death penalty after the jury deadlocks (this allegation is irrelevant since the jury did not deadlock); and, State v. Shurn, 866 S.W.2d 447, 468 (Mo.banc 1993); State v. Whitfield, 837 S.W.2d 503 (Mo.banc 1992) as to proportionality review.

26. Claim XXVI is an allegation that the prosecutor's office and the attorney general's office make arbitrary and capricious dec signs as to when to seek the death penalty. This is a ground for direct appeal, is conclusory and is without merit.

27. Claim XXVII is that the penalty phase instructions are invalid. Allegations of instructional error are trial error. Turner v. State, 765 S.W.2d 708, 710 (Mo.App. 1989). Constitutional objections to jury instructions are properly raised on direct appeal. Roberts v. State, 775 S.W.2d 92, 96 [7] (Mo.banc 1989), cert. denied 494 U.S. 1039, 108 L.Ed.2d 640, 110 S.Ct. 1506 (1990). The allegation is also without merit. See, State v. Ramsey, 864 S.W.2d 320. 336-337 [45] (Mo.banc 1993); State v. Shurn, 866 S.W.2d 447, 466 (Mo.banc 1993); State v. Debler, 856 S.W.2d 641, 655 (Mo.banc 1993).

28. The Court has reviewed the allegations contained in movant's pro se motion. The first several allegations relate to prosecutorial misconduct. Specifically, movant alleges the prosecuting attorney used this case as part of a political campaign, that the prosecutor destroyed evidence, put on perjured testimony, threatened a witness to prevent him form testifying, used opposing theories in his trial and those of his codefendants, suppressed vital information. These claims are not cognizable in this proceeding.

29. Movant alleges his attorney was ineffective for failing to call him as a witness at trial. This allegation was not supported by any evidence at the hearing, and movant declined to offer his own testimony by deposition.

30. Movant alleges his trial counsel failed co adequately prepare for trial by failing to depose several witnesses, failed to consult experts, did not investigate the circumstances surrounding the finding of the body, failed to investigate at the jail, and for failing to show that he was overcharged compared with other cases where the defendant was charged only with felony-murder. Movant alleges that Melvin Leroy Tyler would testify in support of this latter claim and that the overcharging was racially motivated. The Court finds that the majority of these claims were restated in the amended motion and need not be dealt with again. It should be noted that the evidence supported the charge of first degree murder. As to the failure to depose witnesses, such is generally a matter of trial strategy, State v. Prowell, 834 S.W.2d 852 (Mo.App. 1992), and movant failed to show any prejudice.

31. Movant's final pro se allegation is that the death penalty was improperly imposed based on an improper instruction. This allegation is not cognizable in this proceeding and the Court found above that the instruction was not improper.

ORDER

Movant has the burden to establish by a preponderance of the evidence the basis on which he seeks to obtain relief. This Court finds that movant has failed to establish by claims alleged, evidence adduced and the record, that the performance of his attorneys fell below the standard of reasonable effectiveness and that he was prejudiced thereby, or that he was denied due process of law by reason of the claimed failures of his trial counsel. Movant has failed

to allege or to establish facts which, if true, would entitle hum to relief.

THEREFORE, the Court orders, adjudges and decrees that the Motion made pursuant to Supreme Court Rule 29.15 is DENIED.

SO ORDERED:

/s/ Edward M. Peek
Edward M. Peek, Judge

Dated: March 18, 1996

cc: Loyce Hamilton, Attorney for Movant
Nels Moss, Assistant Circuit Attorney
Joe Green, Attorney for Movant

REGINALD CLEMONS

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

I, MAVIS T. THOMPSON, CLERK OF THE CIRCUIT COURT, CITY OF ST. LOUIS, within and for the City and State aforesaid (said Court being a Court of Record, having a Clerk and official Seal), do hereby certify that the annexed and foregoing are full, true copies of certain portions of the trial record, proceedings, and evidence previously adduced writing and filed in the Circuit Court of the City of St. Louis, to wit:

SIX (6) JUDGES DOCKET SHEETS

NOTICE OF APPEAL DATED APR. 26, 1996, COPY OF ORDER DATED APR. 10, 1996 CIVIL ACTION ORDER GRANTING MOTION OF MOVANT FOR PRO HAC VICE ADMISSION, DATED APRIL 10, 1996, COPY OF FINDINGS OF FACT, CONCLUSION OF LAW, ORDER AND JUDGMENT FILED MAR. 18, 1996 (49 PAGES). SUPPLEMENTS TO NOTICE OF THE APPEAL AS REQUEARED UNDER EASTERN DIS. CR. OF APPEAL RULE 300 AND CERTIFICATE OF SERVICE FILED APR. 26, 1996. ORDER GRANTING MOVANT TO APPEAL AS A POOR PERSON FILED APR. 22, 1996. MOTION FOR ORDER ALLOWING APPEAL AS POOR PERSON DATED APR. 10, 1996. AFFIDAVIT AND CERTIFICATE OF SERVICE DATED APR. 10, 1996. CIVIL ACTION GRANTING MOTION

OF MOVANT FOR PRO HAC VICE FILED APR. 10, 1996. CIVIL ACTION GRANTING MOTION OF MOVANT FOR PRO HAC VICE FILED APR. 22, 1996. MOTION FOR CERTIFICATION OF MOVANT FOR PRO HAC VICE FILED APR. 22, 1996. MOTION FOR CERTIFICATION OF JOHN J. KENNEY IN SUPPORT OF PRO HAC VICE ADMISSION FILED APR. 22, 1996. CERTIFICATION OF DAVID MASSENGILL IN SUPPORT OF PRO HAC VICE ADMISSION FILED APR. 10, 1996. CERTIFICATION OF IAN J. YANEWITT IN SUPPORT OF PRO HAC VICE ADMISSION FILED APR. 22, 1996. (49 PAGES). MEMORANDUM IN SUPPORT FOR REGIANLDS BIOGRAPHICAL BACKGROUND AND CLAIM II, III, AND XV OF HIS AMENDED MOTION, PERSONALITY DISORDER, DIAGNOSTIC CRITERIA, LEARNING DISABILITY, DR. FLEMINGS RESULTS, ACHIEVEMENT TEST RESULTS, PHYCHO, NEUROLOGICAL TEST RESULTS, DIFFERENTIAL DIAGNOSIS, SUBSTANCE ABUSE, MITIGATING CIRCUMSTANCES, CERTIFICATE OF SERVICE FILED NOV. 22, 1995. MOVANTS REQUEST THAT THIS COURT CONSIDER EVIDENCE THE AFFADAVIT AND FACE SHEET OF THE WAIS-R SUBMITTED BY DR. PATRICIA FLEMING, CERTIFICATE OF SERVICE AND AFFADAVIT OF DR. PATRICIA FLEMING, TABLE OF SCORE EQUIVALENTS FILED OCT. 17, 1995. MOVANTS MOTION TO ALLOW ENTRY OF APPEARANCE FILED OCT. 17. 1995. OBJECTION TO MOVANTS REQUEST REGARDING DR. FLEMINGS AFFIDAVIT FILED OCT. 17, 1995. DEPOSITION OF IAN JEFFREY YANKWITT FILED OCT. 17, 1995. ENTRY OF

APPEARANCE FILED MAR. 13, 1995. MEMORANDUM FOR CLERK FILED SEPT. 27, 1995. NOTICE OF FILING FILED SEPT. 22, 1995, AND CERTIFICATE OF SERVICE in the cause aforesaid, as fully as the same remains among the records and files of said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis. this 20TH day of MAY 1996.

MAVIS THOMPSON
CLERK, CIRCUIT COURT

By _____
Deputy

Appendix D

FILED

APR 02 1993

FINDINGS

NO PROBABLE CAUSE FOR INEFFECTIVE ASSISTANCE OF COUNSEL:

STATE OF MISSOURI,)
)
Plaintiff,) Cause No. 911-1758 B
vs.)
) Division No. 23
)
Defendant.)

FINDING

The defendant having appeared at the conclusion of final sentencing, having been advised of his or ~~her~~ right to proceed under Rule (~~24.035~~) (29.15), and having been sworn and examined by the Court on the record as to the assistance of counsel received by defendant, and the Court being fully advised in the premises, the Court now FINDS that no probable cause of ineffective assistance of counsel exists. (Trial counsel may continue to represent the defendant if the parties agree upon that continued representation.

Whether or not trial counsel continues, defendant

TEN (10)
has ~~thirty~~ (~~30~~) days to file timely Notice of Appeal.)

SO ORDERED:
/s/ Edward M. Peek
Hon.
Judge, Div.

Entered this 2nd day of April, 1993.

FILED

APR 02 1993

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI _____DEPUTY

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No.: 911-1758 B
vs.	)	Division No.: 23
	)	
REGINALD CLEMONS,	)	
	)	
Defendant.	)	

SENTENCE AND JUDGMENT AND WARRANT OF EXECUTION

Now on this 2nd day of April, 1993, the defendant, Reginald Clemons, appears in person and by his attorneys Robert Constantinou and John Klosterman, State of Missouri appears by its attorney, Nels C. Moss, Jr..

The defendant was found guilty of February 13, 1993, by a jury in Count I of Murder in the First Degree, a class A felony and in Count II of Murder in the First Degree, a class A felony; and the jury on February 18, 1993, returned a verdict of death as to each count. The Court having reviewed the Motion for Judgment of Acquittal and other motions for mistrial, hereby overrules and denies them in all respects.

Allocution having been granted and no just cause having been given why the defendant should not be sentenced; it is hereby the sentence and judgment of this Court in accordance with the verdicts of the Jury that as to Count I - Murder in the First Degree the defendant is sentenced to death; as to Count II - Murder in the First Degree, it is hereby the sentence and judgment of this Court in accordance with the verdict of the jury that the defendant is sentenced to death; if the sentences are modified, it is the Court's intention that they be consecutive. The date of the execution to be set in accordance with an Order of Execution as directed by the Missouri Supreme Court and Rule 29.08(d). The defendant is committed forthwith to the custody of the Missouri Division of Corrections and Human Resources, Director of Potosi Correctional Center for carrying out of this sentence at a date to be determined by said Director.

The Court after hearing finds no probable cause to believe that defendant's counsel were ineffective.

It is ordered that judgment be and is hereby entered in favor of the State of Missouri and against the defendant for the sum of

$68.00 for the Crime Victim's Compensation Fund and that execution issue therefore.

It is ordered that the Clerk of the Circuit Court transmit a certified copy of this judgment and sentence to the Department of Corrections an Human Resources and the Director of the Potosi Correctional Center and that this sentence and judgment serve as the defendant's commitment.

SO ORDERED:

/s/ Edward M. Peek
HONORABLE EDWARD PEEK
Judge, Division No. 23

April 2, 1993
DATE

FORM B

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No.: 911-01758 B
vs.	)	
	)	Division No.: 23
REGINALD CLEMONS,	)	
	)	
Defendant.	)	

SENTENCE AND JUDGMENT

Now, on this 2nd day of April, 1993, comes Nels Moss, Attorney for the State of Missouri, and Defendant in person and by R. Constantinou Attorney for Defendant in open court.

COUNT 1

Where upon, said Defendant is informed by this Court that he/~~she~~ has heretofore on the 13th day of February, 1993.

[✓] been found guilty by the Jury/~~Court~~ ~~[ ] pleaded guilty~~ to the offense of murder 1st and being now asked by the Charge and Degree Court if he/~~she~~ has any legal cause to show why Sentence and Judgment should not be pronounced against him/~~her~~ according to the law, and still failing to show such cause, it is therefore the Sentence, Order and Judgment of this Court that Defendant, Reginald Clemons, (having been found guilty/~~having pleaded guilty~~) as aforesaid, and in accordance with the punishment heretofore assessed by the (Jury/~~Court~~) be and is hereby ordered committed to the Missouri Department of Corrections and Human Resources, for ~~a period of years~~, said sentence to be served (concurrently/consecutively) to the sentence imposed in Death for a total of — years.
(state Count/other Cause No.)

FORM B

COUNT 2

Whereupon, said Defendant is informed by this Court that he/she has heretofore on the 13th day of February, 1993.

[✓] been found guilty by the Jury/~~Court~~

[ ] ~~pleaded guilty~~ on Count 2 to the offense of murder 1st and being now asked by Charge and Degree the Court if he/~~she~~ has any legal cause to show why Sentence and Judgment should not now be pronounced against him/~~her~~ according to the law, and still failing to show such cause, it is therefore the Sentence, Order and Judgment of this Court that Defendant, Reginald Clemons, (having been found guilty/~~having pleaded guilty~~) as aforesaid, and in accordance with the punishment heretofore assessed by the (Jury/~~Court~~) be and is hereby ordered committed to the Missouri Department of Corrections and Human Resources, for a period ~~of ___ years, said sentence to be served (concurrently/consecutively) to the sentence imposed in~~ *Death Penalty*, ~~for a total of _____ years~~.

(state Count/other Cause No.)

Defendant advised of his/~~her~~ rights under Rule ~~24.035~~/29.15; ~~(no probable cause found)~~.

Probation denied.

[✓] It is further ordered by this Court that jail time prior to conviction/plea be allowed Defendant.

[✓] It is further considered, ordered and adjudged by this Court that court costs be taxed against Defendant and that execution issue thereon.

[✓] It is further ordered and adjudged by this Court that the $5.00 Crime Victim Compensation Fee be assessed against the Defendant, payable to the Circuit Clerk, and that execution issue thereon.

[✓] It is further ordered and adjudged by this Court that the State of Missouri have and recover of Defendant the sum of $68.00 for Crime Victim Compensation.

_____

_____

_____

SO ORDERED:
/s/ Edward M. Peek
Circuit Judge

[ ] See attached Supplement Sentence and Judgment Form(s) which is/are made a part hereto.

Appendix E

SELECTED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trail, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Eight Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ...

Appendix F

VERNON'S ANNOTATED MISSOURI STATUTES
TITLE XXXVIII. CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC DEFENDERS
CHAPTER 565. OFFENSES AGAINST THE PERSON
Copr. (C) West Group 1997. All rights reserved.
Current through End of 1996 2nd Reg. Sess.

565.030. Trial procedure, first degree murder

1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single state trial in which guilt and punishment are submitted together.

2. Where murder in the first degree is submitted to the trier without a wavier of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed at which

the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victims and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidenced in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

If the trier is a jury it shall be so instructed. If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

Appendix G

TRANSCRIPT OF VOIR DIRE OF VIRTO DOSS

* * *

[804] MR MOSS: Now initially when the Judge [805] talked to you, I have reread the definition of reasonable doubt. And I said that it was proof that leaves you firmly convinced of the defendant's guilt not proof that overcomes every doubt, or that excludes every doubt. Okay? And, all right.

Hopefully, you understand the distinction, proof that leaves you firmly convinced versus proof that excludes all doubt. What we're operating on is proof beyond a reasonable doubt that leaves you firmly convinced of his guilt. Since I would be asking you to vote for the death penalty, would you require me to exclude all doubt? Even though, you know, that I'm not required to? What I'm required to is give you proof that leaves you firmly convinced of his guilt. However, in view of the death penalty, would you require me to exclude all doubt?

MR. WETTEROTH: I think I could come to terms with reasonable doubt.

MR. MOSS: All right, Okay. Fine. If I proved to you in this case that Mr. Clemons along with, worked along with Mr. Gray, Mr. Winfrey, and Mr. Richarson, and did everything he could to help accomplish the murders of Julie and Robin Kerry, but did not actually, he wasn't the last person to shove them into the water, off the bridge, you know, he didn't shove them into the water finally, could you still consider voting for the death penalty? [806] If he did everything he could to help facilitate, make the murders happen,

but didn't finally push them in, could you vote for for the death penalty?

MR. WETTEROTH: I think not. But again, there are certainly more circumstances that you can —

MR. MOSS: I can't give you the whole scenario.

MR. WETTEROTH: I think not, the way you phrased it.

MR. MOSS: When you say, "I think not." Is it to the extent that you say, "If that's what you're going to show me I can't consider the death penalty"?

MR. WETTEROTH: It sounds as if there are others more culpable, but again, I do not know.

MR. MOSS: All right, thank you. And that's Mr. Marshall Walters?

MR. WALTERS: Right.

MR. MOSS: Okay, Mr. Walters, you have heard my discussion with Mr. Wetteroth. If I prove everything I was supposed to in regards to murder in the first degree, and I proved the aggravating circumstances, and I proved that they were better and stronger than the reasons not to give him the death penalty, could you make the decision in this case that he should get the death penalty and actually vote for it?

[807] MR. WALTERS: Without a doubt, I could.

MR. MOSS: Okay. And, now, if you heard all of the evidence, and you decided that this was not—given what you heard, the level of his participation, or whatever you decided, this was not the kind of case, or he was not the kind of person who should get the death penalty, could you vote for life in prison without parole?

MR. WALTERS: I could do that.

MR. MOSS: Okay, do you understand that for any the two, neither can be automatic? That you must consider—be able to seriously consider both penalties, you understand that Mr. Walters?

MR. WALTERS: Right.

MR. MOSS: I'm not saying whether or not you have a preference. Some people prefer an eye for an eye and a tooth for a tooth. If somebody kills somebody, they should get the death penalty. Other people say, "I don't care what you say, they killed somebody, I'm never going to vote for the death penalty." Those are both valid positions we need to just talk about.

Now, Mr. Walters, is reasonable doubt a good enough standard for you to operate on in this case? Or would you require me to exclude all doubt?

MR. WALTERS: Reasonable doubt.

MR. MOSS: And if I prove to you this young **[808]** man did everything he could to help these other people accomplish these murders, but didn't finally shove them in the river, could you still consider the death penalty?

MR. WALTERS: That would be questionable, I don't know.

MR. MOSS: Well, do you say, and you're thinking, do you say to yourself at this point, "Well, okay, he did this, and this, and that. He did a heck of a lot in this case, but really truthfully speaking, if they're never going to show me he was the fellow that gave them the final push, I'm really not going to consider the death penalty"? Are you thinking that way or are you thinking, "Well, it depends on what they show me, if he didn't push them, I could still."

MR. WALTERS: I could consider it.

MR. MOSS: You're not going to consider it like the ten-story building one, are you?

MR. WALTERS: No.

MR. MOSS: Okay. That's Mr. Doss?

MR. DOSS: Yes.

MR. MOSS: Okay. Mr. Doss, given what I have discussed with the other people so far, if I prove murder in the first degree, beyond a reasonable doubt, prove the aggravating circumstances, beyond a reasonable doubt, and that they're better and stronger than the **[809]** mitigating circumstances, the reasons not to give him the death penalty, could you make the decision that this is the right case, Mr. Clemons is the right defendant to get the death penalty, could you vote for it?

MR. DOSS: No.

MR. MOSS: All right. When you say no, is that based upon a moral, or a religious, or a personal belief that you hold?

MR. DOSS: Religious.

MR. MOSS: Is that a believe that you have held for a long time?

MR. DOSS: Yes.

MR. MOSS: And is this, perhaps a belief that you have talked about with other people?

MR. DOSS: Yes.

MR. MOSS: Do you feel that this belief is so much a part of you, so strong that you could not—that there is nothing I could show you in this case in the form of witnesses, or physical exhibits, or that would let you set that belief aside temporarily for purposes of this case, and let you—enable you to vote for the death penalty? Now, is it that strong that you could not set it aside for this case?

MR. DOSS: Not after you present me with the **[810]** facts, I can.

MR. MOSS: Well, please understand that if we don't, I don't present you with such facts in the first part of this case, you're never going to convict him of murder in the first degree. Okay. But we're assuming for sake of argument that I give you all the facts that prove beyond a reasonable doubt he committed murder in the first degree. We're moving on through there.

Not every murder first degree person gets the death penalty. Sometimes, they get life in prison without parole. The question is, is your religious belief such that if you went down to your jury room, and you're sitting around talking with the other people, and you say, "I can't—I know I said there was a possibility, but really my belief is such that I can't vote to have another man executed." You know. That your belief is so strong that the bottom line when you get done discussing and making up your mind about it, you're going to say, "My principles, my religious beliefs just won't let me do it"?

MR. DOSS: No.

MR. MOSS: Now, if you talk about reasonable doubt, would you think or would you think that because I'm asking you to consider the death penalty and set aside your beliefs, would you required me to exclude all doubt form your mind about ever part of this case. Or could you **[811]** operate on the principle of reasonable doubt that the Judge has talked to you about, proof that leaves your firmly convinced? Would I have to exclude all doubt or is proof that leaves you firmly convinced enough for you to—cause you to vote for the death penalty? You know, all doubt versus firmly convinced?

MR. DOSS: Firmly convinced.

MR. MOSS: You could operate—That's a good enough standard for you to operate on, firmly convinced of aggravating circumstances, and you felt the death penalty was appropriate, you could vote for it?

MR. DOSS: Yes.

MR. MOSS: Now, if I proved to you that he did everything he could to help, and assist these other fellows in committing these murders that night, but didn't finally pushed the ladies off the bridge, could you still vote for the death penalty, if you thought it was appropriate.

MR. DOSS: No.

MR. MOSS: Okay. Do you think, given your belief and given what we have talked about so far, do you think there is anything I can really show you that would let you vote for the death penalty, even though I could never show you that he was the one who finally pushed them off? Is there anything else you think I could show you that would change your mind about the fact that I could not **[812]** show you he pushed them off, but he did everything else?

MR. DOSS: Yes.

MR. MOSS: You think there is something I might be able to show you that would change your mind about voting for the death penalty if I didn't show you he pushed them over, you could still vote for the death penalty, even though I could not show you he pushed them off?

MR. DOSS: Yes.

MR. MOSS: Mr. Doss, you have no acquaintances or did not know any person involved in this case, do you.

MR. DOSS: No.

MR. MOSS: Okay. Mr. Menker, you have heard my discussions so far. If I prove to you murder in the first degree, beyond a reasonable doubt in this case, and proved the aggravating circumstances, and they were better than the mitigating reasons, could you make the decision to vote for the death penalty, and actually vote for it, if you though it was right and just in this case?

MR. MENKER: No.

MR. MOSS: When you say no, is that based upon some —

MR. MENKER: Personal belief.

MR. MOSS: Personal or religious reasons that you hold?

MR. MENKER: Mainly, personal. **[813]**

MR. MOSS: Have you talked about this with other people before?

MR. MENKER: Oh, yes.

MR. MOSS: Do you think that there is anything I could show you in the form of witnesses, or physical exhibits that would change your mind so that you can set aside that belief temporarily, and actually vote for the death penalty?

MR. MENKER: I don't feel I have the power over life that calls to put someone to death.

MR. MOSS: Well, are you saying then there is nothing -- you don't think there is anything I could show you that would change—let you set aside your beliefs?

MR. MENKER: No.

MR. MOSS: When we talked about the standard of proof beyond a reasonable doubt we've discussed so far with the others, is that a good enough standard for you to operate on here even though we're talking about the death penalty?

MR. MENKER: Reasonable doubt, yeah. I could—I couldn't put him to death, but I could.

MR. MOSS: Well, what I'm just saying that, is proof that leave you firmly convinced for all other purposes good enough for you to work on in this case?

MR. MENKER: Yes.

[814] MR. MOSS: Okay. Would the fact that I could prove he did everything else to help these other fellows murder these ladies, but cannot prove to you that he pushed them off the bridge, you know, that he helped get them there and everything, if I could not prove that to you, would that also be a reason why you could not consider the death penalty or would that not be a reason?

MR. MENKER: That wouldn't be a reason.

MR. MOSS: That's Miss Clifford?

MS. CLIFFORD: Yes.

MR. MOSS: Miss Clifford, if I proved murder in the first degree of Julie and Robin Kerry, and I proved aggravating circumstances, beyond a reasonable doubt, and proved that the reason not to give him the death penalty were not strong enough,

not stronger than the reason to give him the death penalty, could you make the decision to give him the death penalty and actually vote for it in this case.

MS. CLIFFORD: Yes.

MR. MOSS: Likewise, if you thought from what you heard in this case that this wasn't the case or the particular defendant to give the death penalty to him, could you vote for life imprisonment without parole?

MS. CLIFFORD: Yes.

* * *

[863] MR. WETTEROTH: Now is it Mr. Marshall E. Walters?

MR. WALTERS: Yes.

MR. COSTANTINOU: Now, as I understand it, you said that you could give the death penalty?

MR. WALTERS: Yes.

MR. COSTANTINOU: And you said without a doubt you could. Would that mean under the proper circumstances?

MR. WALTERS: Under the proper circumstances.

MR. COSTANTINOU: Let's say that you found Mr. Clemons guilty in the situation, the trial. Would you automatically want to vote for the death penalty? If you found him guilty of murder?

MR. WALTERS: Beyond a reasonable doubt, yes.

MR. COSTANTINOU: That's not my question. My question is if you found him guilty, you're sitting on the jury, and you bring back a guilty verdict, and then the Judge says, "Now, we're going to consider this second mini-trial, so to speak, and decide whether or not he gets the death penalty. Would you automatically say, yes, or would you consider life without probation or parole?

MR. WALTERS: I would consider the gamut.

MR. COSTANTINOU: You would consider what?

MR. WALTERS: The gamut.

MR. COSTANTINOU: The full range?

[864] MR. WALTERS: Expanded full range.

MR. COSTANTINOU: You mean both?

MR. WALTERS: Yes.

MR. COSTANTINOU: You do realize, even though you felt he was guilty of the death penalty, or needed it, you could maybe not give it, even?

MR. WALTERS: Depending on the circumstances, I have to.

MR. COSTANTINOU: How you felt and what the proof was?

MR. WALTERS: Yes.

MR. COSTANTINOU: And could you vote for the death penalty under that circumstance?

MR. WALTERS: Possibly.

MR. COSTANTINOU: Would it depend on the proof?

MR. WALTERS: Yes.

MR. COSTANTINOU: You wouldn't have anything against it, then, in other words?

MR. WALTERS: No.

MR. COSTANTINOU: And what about publicity, have you had any prejudgments, or you have information about this that maybe you would —

[865] MR. WALTERS: I haven't had enough of—I haven't heard that much about it.

MR. COSTANTINOU: All right. You haven't formed any opinions then?

MR. WALTERS: No.

MR. COSTANTINOU: You understand, as he sit's here right now, he's presumed innocent?

MR. WALTERS: Yes.

MR. COSTANTINOU: You understand the burden in on the State?

MR. WALTERS: Yes.

MR. COSTANTINOU: And you understand that this idea of beyond a reasonable doubt?

MR. WALTERS: Yes.

MR. COSTANTINOU: Would you hold the State to that standard?

MR. WALTERS: Yes.

MR. COSTANTINOU: All right, do you understand that he doesn't have to prove his innocence at this time?

MR. WALTERS: Yes, I know that.

MR. COSTANTINOU: You would make him do that, would you? Prove his innocence?

MR. WALTERS: Yes. Oh, I would not.

MR. COSTANTINOU: Thank you. Now, is this, the name, Virto?

[866] MR. DOSS: Correct.

MR. COSTANTINOU: Virto Doss. All right, now, sir, am I correct in saying that under some circumstances you could give the death penalty?

MR. DOSS: Yes.

MR. COSTANTINOU: Would it be soul-searching?

MR. DOSS: Yes.

MR. COSTANTINOU: Would it be fair to say that you would have to be firmly convinced and beyond a reasonable doubt?

MR. DOSS: Yes.

MR. COSTANTINOU: All right, you understand both the first trial?

MR. DOSS: Yes.

MR. COSTANTINOU: That you first have to find him guilty before you could get to the second?

MR. DOSS: Yes.

MR. COSTANTINOU: All right. We're talking again about this acting with another type of thing under those circumstances, if you felt it warranted considering the death penalty?

MR. DOSS: Yes.

MR. COSTANTINOU: Now, you would have to be firmly convinced?

MR. DOSS: Yes.

[867] MR. COSTANTINOU: All right. And is there anything that you have heard about this trial which would, or this situation which would cause you to be prejudgmental?

MR. DOSS: No.

MR. COSTANTINOU: And could you give Mr. Clemons a fair trial?

MR. DOSS: Yes.

MR. COSTANTINOU: Thank you. David Menker?

MR. MENKER: Yes.

MR. COSTANTINOU: You were asked if you could give the death penalty, and I think your comment was you do not believe you should have the power over life or death.

MR. MENKER: And have you had since list night to think about this? Do you still believe that?

MR. MENKER: Yes.

MR. COSTANTINOU: Then so let's say we go through a first trial. Could you beyond a reasonable doubt find the man guilty of some kind of crime?

MR. MENKER: Yes.

MR. COSTANTINOU: That wouldn't cause you a problem?

MR. MENKER: No.

MR. COSTANTINOU: And the Judge says to you, [868] "Now look, you could give him life without probation, or parole, under certain circumstances, or the death penalty under certain circumstances." And the State says, "I think we have proven this, and we're going to ask for this." And then you're saying that under no circumstance could you give the death penalty?

MR. MENKER: Right, I couldn't.

MR. COSTANTINOU: Nobody could sway you at all?

MR. MENKER: No.

MR. COSTANTINOU: How about this business of pushing someone off the bridge, or acting with another? You understand what that is?

MR. MENKER: Yes.

MR. COSTANTINOU: You understand that they may try to ask for the death penalty under those circumstances?

MR. MENKER: Right.

MR. COSTANTINOU: Do you understand that the standard is of beyond a reasonable doubt?

MR. MENKER: Yes.

MR. COSTANTINOU: And would you stay with that standard?

MR. MENKER: Yes.

MR. COSTANTINOU: And could you follow the Judge's instructions, except for the part about the death penalty? **[869]**

MR. MENKER: Correct.

MR. COSTANTINOU: And have you heard anything about this trial or formed any opinions about it?

MR. MENKER: I have heard about it, I haven't formed any opinions.

MR. COSTANTINOU: Could you give Mr. Clemons a fair trial?

MR. MENKER: Yes.

MR. COSTANTINOU: Thank you. Now, Miss Stella Clifford, she has been excused.

THE COURT: Correct.

MR. COSTANTINOU: All right, now, Mr. Harry E. Jones?

MR. JONES: Yes.

MR. COSTANTINOU: Now, the State, Mr. Moss, asked you yesterday if you could give the death penalty.

MR. JONES: Yes, I could.

MR. COSTANTINOU: And you said you could. And then, my understanding of your answer was that if he was found guilty of a murder, you would automatically vote for the death penalty?

MR. JONES: That's right.

MR. COSTANTINOU: You wouldn't consider life without probation?

MR. JONES: No way.

[870] MR. CONSTANTINOU: You would not?

MR. JONES: No way.

MR. COSTANTINOU: And then you said that you had formed some opinions about this case?

MR. JONES: Yes, I have.

MR. COSTANTINOU: Now, I don't need to know those. But did you hear them from the newspaper, or TV or friends, or what?

MR. JONES: Newspaper, TV.

MR. COSTANTINOU: Okay. And you understand what reasonable doubt is?

MR. JONES: Oh, yes.

MR. COSTANTINOU: Miss Marion Baker?

MS. BAKER: Yes.

MR. COSTANTINOU: I'm looking at the wrong place here. You said you could vote for the death penalty under some circumstances?

MS. BAKER: Yes.

MR. COSTANTINOU: All right. And that could be the circumstances after a first trial, and a guilty finding, if he qualified, and the State proved what they thought they needed, and they wanted to ask for it, could you vote for the death penalty then?

MS. BAKER: Yes.

* * *

[897] MR. HAWES: It is Burton.

MR. COSTANTINOU: B-U-R-T-O-N?

MR. HAWES: Yes, sir.

MR. COSTANTINOU: And do you understand the concept of beyond a reasonable doubt?

MR. HAWES: Yes, but I mean, I'm all for the electric chair and that death penalty, and all of that if he's wrong, in proving guilt. But like this gentleman next to me said, it was so much around where I work, I don't feel I can give this man a fair trial. I read so much in the paper and on the news.

MR. COSTANTINOU: You don't think —

MR. HAWES: I have made a decision and I haven't even heard nothing.

MR. COSTANTINOU: And would we have to go to great length to prove his innocence?

MR. HAWES: It has to go a long, long way. And I don't feel I can give him a fair trial.

MR. COSTANTINOU: I believe that's it, Your Honor.

(Counsel approached the bench and the following proceedings were had out of the hearing of the venirpanel:)

THE COURT: All right, are there any motions to strike for cause on behalf of the State?

[898] MR. MOSS: Yes, Mr. Wetteroth, despite Mr. Constantinou's questioning, he never reached the point where he asked him specifically concerning acting with another. Initially, he said he could not do it, would not if the guy didn't push him, he couldn't do it. Not the least of which he also said he's personally

against the death penalty. And he has made comments that he couldn't do it, couldn't, wouldn't do it, but then backtracked and said he might do it. But the problem is, he never was rehabilitated on acting with another.

MR. COSTANTINOU: I believe he was. I believe he was satisfactorily rehabilitated, and he was a good juror.

THE COURT: My notes reflect "not for," when Mr. Constantinou voir dired. But from the statement that he made with respect to acting with another, "I think not." But there might be more to it. And then he was asked if he could follow the law, and he said, "I hope so."

MR. MOSS: Right, right, that's what I'm saying. Every answer he ever gave, he never committed himself to saying, I could vote for the death penalty, I could do acting with another. He never did. And he also said he had a personal preference that there would be none, but that he could do it.

THE COURT: I'm left with the feeling that some of **[899]** his initial responses may have been due to the lay person's unfamiliarity with these legal concepts. I think he's qualified.

MR. MOSS: Here, you know what the last thing he said about the instructions? When he asked him, he said, "I hope I can follow it."

MR. COSTANTINOU: Well —

MR. MOSS: Where does he ever say, "I will"?

MR. COSTANTINOU: I think he's a qualified juror.

THE COURT: I think he is, but I'll ask him myself. I'll defer my ruling on Mr. Wetteroth. Mr. Walters rehabilitated himself.

And Mr. Doss initially said no death penalty, religious reasons, then backtracked a little. He initially said all doubt, and I don't think he has been rehabilitated by just asking, "Well, would you follow the instructions? Would you do what the Judge tells you?" I think these people need to be given an alternative to rehabilitate them. You know, much to the extent that he did with Ms. Farrario, but we'll get to her. He said no death penalty on acting with another.

MR. COSTANTINOU: Judge, when we started yesterday, he said, no. Then I rehabilitated him. And he said, "I could give it" today. And I asked him if he could [900] follow the instructions, and he understood the difference between the two. And he said he certainly did.

THE COURT: My recollection, or my notes, he stated yes, that with respect to acting with another, he could not consider the death penalty. And I don't think he was rehabilitated on that today. So I'll grant the State's motion to strike Juror No. 948, Virto Doss for cause.

MR. MOSS: And I might add for the record he's got the same last name as the defendant's mother.

MR. COSTANTINOU: Is it Doss?

MR. MOSS: Yeah. Menker, didn't believe in the death penalty, personal, religious reasons. Cause.

THE COURT: Is there anything on behalf of the defendant?

MR. COSTANTINOU: Well, we make objection to all of these strikes of course, all of these strikes.

THE COURT: Juror No. 963, David J. Menker is excused for cause.

MR. MOSS: And Miss clifford is already gone.

MR. COSTANTINOU: And I don't notice a little check mark there, Judge.

THE COURT: Mr. Jones, I don't think he could set aside his opinion for the death penalty on the case. I move to strike him for cause.

MR. COSTANTINOU: We would agree with that.

[901] THE COURT: Juror No. 856, Harry E. Jones is excused for cause, by consent.

MR. MOSS: All right, Marion Baker indicated that she could— she—you know, without question, she would require for the death penalty beyond all doubt. When she was asked about acting with another, she said, "No, I don't think so." I don't doubt that he told her, "Well, will you follow the Court's instructions?" And, you know, but he never said, you know, would you change—you know, yesterday, he said, and "Would you? And, you know, she has not been rehabilitated on all doubt.

MR. COSTANTINOU: I think she has been, and I just make an objection to it.

THE COURT: Well, I think she was rehabilitated. Yet she aid beyond—She did say, her initial response was she would exclude all doubt. Today she changed her position to reasonable doubt. And then she said, whatever the Judge said, which indicates that she will follow the Court's instructions. So I'll deny the motion to strike Juror No. 996, Marion W. Baker.

MR. MOSS: Mr. Parks, cause. All doubt.

MR. COSTANTINOU: I make an objection to him being stricken.

THE COURT: Okay. I'll grant the motion to strike Juror No. 767, Dallas J. Parks for cause.

[902] MR. MOSS: Miss Kelly, all doubt, and never without him pushing, under any circumstances. I move to strike her for cause.

MR. COSTANTINOU: I make objection to it.

THE COURT: Right. The Court grants the State's motion. And Juror No. 941, Allois Kelly is excused for cause.

MR. MOSS: Miss Rosario three different times today said all doubt, unequivocally said it yesterday. And the mere fact that he led her, whether that would be enough, firmly convinced would be enough for "you" wouldn't it.

MR. COSTANTINOU: I don't think she understood anyway. That's my opinion.

THE COURT: I think she has some problem. With her, whether it's a language problem, or whether it's a confidence problem, but she changed her response every time a question was asked. It's just too dangerous. She's too—and when I say unstable, I don't mean mentally unstable. But, again, as I said about one of them, I think this lady would just go along with whatever everybody did. So I'll grant the State's motion to strike Juror No. 789, Rosemarie Rosario, for cause.

MR. COSTANTINOU: And the defendant would agree with that.

Appendix H

PENALTY PHASE JURY INSTRUCTIONS

NUMBERS 36, 38, 29 41, 43 AND 44

INSTRUCTION NO. 36

In determining the punishment to be assessed under Count I against the defendant for the murder of Julie Kerry, you must first unanimously determine whether one or more of the following aggravating circumstances exist:

1. Whether the murder of Julie Kerry was committed while the defendant was engaged in the commission of another unlawful homicide of Robin Kerry.

A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Julie Kerry was committed while the defendant was engaged in the attempted commission of another unlawful homicide of Thomas Cummins.

[See definition of unlawful homicide above]

An attempt to commit an offense is the doing of any act, with the purpose of committing an offense, which is a substantial step towards the commission of the offense. A substantial step towards the commission of an offense means conduct which is strongly

corroborative of the firmness of a purpose to complete the commission of the offense.

3. Whether the defendant cause or directed Marlin Gary and Antonio Richardson to murder Julie Kerry.

4. Whether the defendant committed the murder of Julie Kerry while the defendant was knowingly aiding or encouraging Marlin Gray and Antonio Richardson in the perpetration or attempt to perpetrate rape.

A person commits the crime of forcible rape if he has sexual intercourse with another person without that person's consent by the use of forcible compulsion.

Forcible compulsion means either (a) a physical force that overcomes reasonable resistance; or (b) a threat, expressed or implied, that places a person in reasonable fear of death of herself or another person.

5. Whether the defendant committed the murder of Julie Kerry while the defendant was knowingly aiding or encouraging Marlin Gary and Antonio Richardson in the perpetration or attempt to perpetrate robbery.

A person commits robbery in the first degree when he forcibly steals and in the course of stealing threatened the use of a deadly weapon.

[See definition of Attempt above]

6. Whether the defendant murdered Julie Kerry for the purpose of the defendant and Marlin Gray and Antonio Richardson receiving money or any other thing of monetary value from Thomas Cummins.

7. Whether the murder of Julie Kerry involved depravity of mind and whether as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you unanimously find paragraphs (a) and (b); if you also unanimously find additional reasons contained in either one or both of paragraphs (c) and (d) you must specify in your verdict form paragraphs 7, (a) and (b) and those additional reasons you have unanimously found:

(a) That defendant and Marlin Gray and Antonio Richardson inflicted pain or emotional suffering on Julie Kerry and that the defendant did so for the purpose of making her suffer before dying, and

(b) That defendant and Marlin Gray and Antonio Richardson committed repeated and excessive acts of physical abuse upon Julie Kerry and the killing was therefore unreasonably brutal, and

(c) That the defendant killed Julie Kerry after she was rendered helpless by Marlin Gray and Antonio Richardson and that the defendant exhibited callous disregard for the sanctity of all human life, and

(d) That the defendant killed Julie Kerry as part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life.

8. Whether the murder of Julie Kerry was committed for the purposes of avoiding a lawful arrest of the defendant or Marlin Gray and Antonio Richardson.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exist, you must return a verdict fixing the punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

MAI-CR 313.40

Submitted by State

GIVEN

/s/ Edward M. Peek
Circuit Judge

INSTRUCTION NO. 38

As to Count I , if you decided that one or more sufficient aggravating circumstances exist to warrant the imposition of death as submitted in Instruction No. 36, each of you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Julie Kerry.

You may also consider:

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the defendant was an accomplice to the murder of Julie Kerry committed by another person and his participation was relatively minor.

3. Whether the defendant was an accomplice to the murder of Robin Kerry committed by another person and his participation was relatively minor.

4. The age of the defendant at the time of the crime.

You may also consider any circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree on the existence of the same mitigating circumstance. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstances found to exist, then you must return a verdict fixing

defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

MAI CR-313.44

Submitted by Defendant

GIVEN

/s/ Edward M. Peek
Circuit Judge

INSTRUCTION No. 39

As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

MAI-CR 313.46

Submitted by State

GIVEN

/s/ Edward M. Peek
Circuit Judge

INSTRUCTION NO. 41

In determining the punishment to be assessed under Count II against the defendant for the murder of Robin Kerry, you must first unanimously determine whether one or more of the following aggravating circumstances exist:

1. Whether the murder of Robin Kerry was committed while the defendant was engaged in the commission of another unlawful homicide of Julie Kerry.

A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Robin Kerry was committed while the defendant was engaged in the attempted commission of another unlawful homicide of Thomas Cummins.

[See definition of unlawful homicide above]

An attempt to commit an offense is the doing of any act, with the purpose of committing an offense, which is a substantial step towards the commission of the offense. A substantial step towards the commission of an offense means conduct which is strongly corroborative of the firmness of a purpose to complete the commission of the offense.

3. Whether the defendant caused or directed Marlin Gary and Antonio Richardson to murder Robin Kerry.

4. Whether the defendant committed the murder of Robin Kerry while the defendant was knowingly aiding or encouraging Marlin Gray and Antonio Richardson in the perpetration or attempt to perpetrate rape.

A person commits the crime of forcible rape if he has sexual intercourse with another person without that person's consent by the use of forcible compulsion.

Forcible compulsion means either (a) a physical force that overcomes reasonable resistance; or (b) a threat, expressed or implied, that places a person in reasonable fear of death of herself or another person.

5. Whether the defendant committed the murder of Robin Kerry while the defendant was knowingly aiding or encouraging Marlin Gary and Antonio Richardson in the perpetration or attempt to perpetrate robbery.

A person commits robbery in the first degree when he forcibly steals and in the course of stealing threatened the use of a deadly weapon.

[See definition of Attempt above]

6. Whether the defendant murdered Robin Kerry for the purpose of the defendant and Marlin Gray and Antonio Richardson receiving money or any other thing of monetary value from Thomas Cummins.

7. Whether the murder of Robin Kerry involved depravity of mind and whether as a result thereof, the murder was outrageously

and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you unanimously find paragraphs (a) and (b); if you also unanimously find additional reasons contained in either one or both of paragraphs (c) and (d) you must specify in your verdict form paragraphs 7, (a) and (b) and those additional reasons you have unanimously found:

(a) That defendant and Marlin Gray and Antonio Richardson inflicted pain or emotional suffering on Robin Kerry and that the defendant did so for the purpose of making her suffer before dying, and

(b) That defendant and Marlin Gray and Antonio Richardson committed repeated and excessive acts of physical abuse upon Robin Kerry and the killing was therefore unreasonably brutal, and

(c) That the defendant killed Robin Kerry after she was rendered helpless by Marlin Gray and Antonio Richardson and that the defendant exhibited a callous disregard for the sanctity of all human life, and

(d) That the defendant killed Robin Kerry as part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life.

8. Whether the murder of Robin Kerry was committed for the purpose of avoiding a lawful arrest of the defendant or Marlin Gray and Antonio Richardson.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a

reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exist, you must return a verdict fixing the punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

MAI-CR 313.40

Submitted by State

GIVEN

/s/ Edward M. Peek
Circuit Judge

INSTRUCTION NO. 43

As to Count II, if you decided that one or more sufficient aggravating circumstances exist to warrant the imposition of death as as submitted in Instruction No. 41, each of you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Robin Kerry.

You may also consider:

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the defendant was an accomplice to the murder of Julie Kerry committed by another person and his participation was relatively minor.

3. Whether the defendant was an accomplice to the murder of Robin Kerry committed by another person and his participation was relatively minor.

4. The age of the defendant at the time of the crime.

You may also consider any circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree on the existence of the same mitigating circumstance. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstances found to exist, then you must return a verdict fixing

defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

MAI CR-313.44

Submitted by Defendant

GIVEN

/s/ Edward M. Peek
Circuit Judge

INSTRUCTION NO. 44

As to Count II, you are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

MAI-CR 313.46

Submitted by State

GIVEN

/s/ Edward M. Peek
Circuit Judge

Supreme Court, U. S.
F I L E D
OCT 10 1997
CLERK

No. 97-484

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

REGINALD CLEMONS,

Petitioner,

vs.

STATE OF MISSOURI

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

BRECK K. BURGESS
Assistant Attorney General

Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent

INDEX

Pages

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 2

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Hall v. State, 336 S.E.2d 812 (Ga. 1995) 5

Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) 7

Kilgore v. Bowersox, No. 96-2563EM, slip op. at 9 (8th Cir. 1995 September 8, 1997) 11

LaRette v. Delo, 44 F.3d 681 n. 4 (8th Cir. 1995), cert. denied 116 U.S. 246 (1995) 11

Michigan v. Mosley, [96 U.S. 321, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975)] 5

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 2,3,4,6

Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) 5

Sidebottom v. Delo, 46 F.3d 744 (8th Cir. 1995), cert. denied 116 U.S. 144 (1995 11

State v. Brown, 902 S.W.2d 278 (Mo. banc 1994), cert. denied 116 S.Ct. 679 (1995) 12,13

State v. Clemons, 946 S.W.2d 206 (Mo. banc 1997) 7,9,12

State v. Engel, 859 S.W.2d 822 (Mo.App., W.D. (1983) 7

State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988), cert. denied 490 U.S. 1113 (1989) . . . . . .

State v. Jones, 749 S.W.2d 356 (Mo. banc 1988), cert. denied 488 U.S. 871 (1988) 13

State v. Kinder, 942 S.W.2d 313 (Mo. banc 1996) . . . 10

State v. Ladd, 431 A.2d 60 (Me. 1981) 5

State v. LaRette, 648 S.W.2d 96 (Mo. banc 1983), cert. denied 459 U.S. 1137 (1983) 12

State v. Lewis, 645 P.2d 722 (Wash.App. 1983) 5

State v. Mercer, 618 S.W.2d 1 (Mo. banc 1981), cert. denied 454 U.S. 933 (1981) 11

State v. Petary, 790 S.W.2d 243 (Mo. banc 1990), cert. denied 498 U.S. 973 (1990 12

State v. Reese, 795 S.W.2d 69 (Mo. banc 1990), cert. denied 499 U.S. 1110 (1991) 5

State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982), cert. denied 459 U.S. 928 (1982) 11, 12

State v. Smith, 588 S.W.2d 27 (Mo.App., E.D. 1979) . . 5

State v. Smulls, 935 S.W.2d 9 (Mo. banc 1996), cert. denied 117 S.Ct. 2415 (1997) 13

State v. Wise, 879 S.W.2d 494 (Mo. banc 1994), cert. denied 115 S.Ct. 757 (1995) 13

State v. Zeitvogel, 707 S.W.2d 365 (Mo. banc 1986), cert. denied 479 U.S. 871 (1986) 13

Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844,

83 L.Ed.2d 841 (1985) 9

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733,
77 L.Ed.2d 235 (1983) 11, 12

Statutes

Page

Section 565.032.2(4), RSMo 1994 11

Section 565.032.2(11), RSMo 1994 11

STATEMENT OF THE CASE

Petitioner, Reginald Clemons, was convicted of murder in the first degree, §565.020, RSMo 1994, for which he was sentenced to death. Petitioner filed a direct appeal. Petitioner then filed a motion to vacate, set aside, or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. Petitioner's Rule 29.15 motion was consolidated with his direct appeal. The facts relating to petitioner's offense are summarized in the opinion of the Missouri Supreme Court affirming petitioner's conviction, sentence, and the denial of post-conviction relief. State v. Clemons, 946 S.W.2d 206 (Mo. banc 1997). Respondent does not dispute that petitioner's claims were presented to the Missouri Supreme Court.

ARGUMENT

I. Petitioner Did Not Unequivocally Invoke His Fifth Amendment Right To Remain Silent And, In Fact, He Made It Clear That He Wanted To Waive His Miranda Rights.

In his petition for a writ of certiorari, petitioner appears to claim that the trial court erred when it admitted into evidence his audiotaped statement to the police, because the police did not honor his constitutional rights after he allegedly unequivocally asserted his constitutional rights (Petition at 11-13).

The record shows that at a little after 6:00 p.m., on April 7, 1991, Officers Walsh and Brauer went to a location on Barken Avenue in Northwoods and spoke to petitioner (Tr. 2192-2196; 2840-2844). The officers identified themselves and asked if petitioner would accompany them to police headquarters, because his name had surfaced in "the bridge case" (Tr. 2194, 2846). Petitioner agreed (Tr. 2194, 2846). He got into the officers' car and accompanied them to police headquarters (Tr. 2194-2195, 2846). They arrived at the interview room at about 6:30 p.m. (Tr. 2197, 2846). Petitioner was not under arrest (Tr. 2848). He was not handcuffed, and he was free to leave (Tr. 2195, 2846).

Before being interviewed by Officers Pappas and Brauer, petitioner was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (Tr. 1313, 1320, 2397-2398, 2847-2848). Petitioner indicated that he understood his rights and he said, "I don't want a lawyer, I'll talk to you guys" (Tr. 2398, 2848). Petitioner was interviewed for about forty-five minutes, took a twenty minute break, and then was interviewed from about 7:50 to 9:05 p.m. (Tr. 2399, 2404, 2859). Before and during the

making of this statement, petitioner was not beaten, threatened, coerced, and he did not ask for an attorney (Tr. 1303, 1316, 1327-1328, 1370, 2848, 2858, 2862-2863, 2879-2882, 2932).

Petitioner agreed to make an audiotaped statement, was again informed of his Miranda rights, and he made a misstatement about whether he wanted to waive them (Tr. 2397-2406, 2847-2848, 2862-2863; State's Exhibits 136-137). He quickly clarified what he meant and indicated that he desired to waive his Miranda rights again and make a statement (State's Exhibits 136-137). Specifically, the record shows that the following occurred when petitioner was asked about waiving his rights during the audiotaped statement:

> Q: Okay. At this time, Reginald, -- uh -- do you wish to waive these constitutional rights and make a statement concerning what happened on the night of April 5th, 1991, on this -- on the Chain of Rocks Bridge?
>
> A: No, sir.
>
> Q: Okay, you do -- you don't want to make a statement at this time?
>
> A: I don't want to use the rights.
>
> Q: In other words your -- okay -- in other words, you're waiving your rights to make statement. Is that -- is that right?
>
> A: Yes.
>
> Q: Okay. So you're waiving your constitutional rights?

A: Okay, sir.

DET. BRAUER: That means you give up the right -- what it means is that you give up those rights and that you want to talk about the incident. Is that what you want to do? Tell us about the incident?

A: Yes, sir.

DET. BRAUER: Okay. That's what we mean. That's what it means to waive your rights.

DET. PAPPAS: All that means is that you want to waive these rights at this time to make a -- an audio taped statement. That's what we're talking about. Okay. Do you still understand what we're saying? I don't want you to be confused about this.

A: Yes. I want to tell everything that happened up on the bridge.

Q: Okay. So you're wishing to make a statement?

A: Yes.

(State's Exhibits 136, 137 p. 3-4).

It is clear that if an individual unequivocally indicates that he wishes to remain silent, "interrogation" must cease. Miranda v. Arizona, supra 384 U.S. at 474. However, if an individual is indecisive, there may be some question on whether he waived or did not waive his rights. Id. at 485;

State v. Smith, 588 S.W.2d 27, 30 (Mo.App., E.D. 1979). The surrounding circumstances should be considered. See State v. Reese, 795 S.W.2d 69, 71-72, 76-82 (Mo. banc 1990), cert. denied 499 U.S. 1110 (1991). For example, "When a suspect who has been informed of his rights expresses both a desire for counsel and a desire to continue the interview without counsel, it is permissible for the questioning official to make further inquiry to clarify the suspect's wishes." State v. Lewis, 645 P.2d 722, 726 (Wash. App. 1982); see also Hall v. State, 336 S.E.2d 812, 816 (Ga. 1995).

An all-important distinction must here be drawn between on the one hand, "an inquiry for the limited purpose of clarifying whether the defendant is invoking his right to remain silent" and, on the other hand, "questioning aimed at eliciting incriminating statements concerning the very subject on which the defendant has invoked his right." State v. Ladd, 431 A.2d 60, 63 (Me. 1981).

As can be seen from the above-quoted portion of the record, petitioner did not intend to invoke his Fifth Amendment rights; he simply misspoke. Officer Pappas recognized that petitioner misunderstood the question, in light of the fact that petitioner had just stated that he wanted to make another statement, and Officer Pappas merely got petitioner to elarify his response. Officer Pappas' question was "calculated innocently to clarify defendant's statement, rather than improperly 'to persuade (defendant) to reconsider his position,' Michigan v. Mosley, [96 U.S. 321, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)], or otherwise to infringe upon his right to silence." State v. Ladd, supra at 63. Nor was it "badgering," see Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), which was intended to be prevented by the prophylactic rules created by this Court. It was simply a permissible request for clarification.

The Missouri Supreme Court properly stated:

> Unlike appellant, we do not read Miranda searching for out-of-context sentences that support a preferred outcome. Honestly read, Miranda contemplates situations in which there may be some question as to whether a defendant wishes to assert his rights or not. In such instances, the interviewer may clarify the defendant's intent by continued questioning as to whether or not the defendant does or does not waive his rights. Miranda v. Arizona, 384 U.S. 436, 485, 86 S.Ct. 1602, 1633-1634, 16 L.Ed.2d 694 (citing with approval Federal Bureau of Investigation procedures for conduct of custodial interviews with respect to subject's constitutional rights).
>
> In light of the fact that appellant had been freely speaking with the police for the past two hours, had already confessed, and had agreed to make a tape-recorded statement before the detectives began to record the confession, we find that appellant's response was not an unequivocal assertion of his rights but rather an ambiguous, equivocal statement of his intent that required clarification. The detectives did not violate appellant's constitutional rights by asking questions to clarify his intentions. His intentions, as reflected by the entire conversation, were to waive his rights and make a statement.
>
> The trial court did not abuse its discretion in failing to suppress the taped confession.

State v. Clemons, 946 S.W.2d 206, 219 (Mo. banc 1997).

Moreover, petitioner was not prejudiced by the admission of this evidence. It was consistent with the testimony about his non-audiotaped confession. If petitioner took the stand and denied that he confessed, the audiotaped confession would have been admissible, regardless of whether petitioner's Fifth Amendment rights were violated, in order to prevent petitioner from committing perjury. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); State v. Engel, 859 S.W.2d 822 829-830 (Mo.App., W.D. 1993). Thus, petitioner's first claim does not warrant review by this Court.

II. Venireperson Doss Was Not Qualified To Serve On The Jury

In petitioner's second claim, he appears to allege that this Court should grant a writ of certiorari, because the trial court abused its discretion when it struck venireperson Doss for cause on the ground that it did not believe that Doss could consider the full range of punishment (Petition at 17).

The record shows that Doss initially said that he could not vote for the death penalty, because of long-held religious beliefs (Tr. 808-809). He then said that he could consider the death penalty, unless petitioner was not the person who threw the ladies off of the bridge (Tr. 811). Doss then did an about-face again and said that he could vote for the death penalty even if petitioner did not throw the girls off the bridge (Tr. 811). He later said that he could consider the death penalty in the acting with another context, but he did not say whether he could consider it if petitioner was the accomplice that did not throw the victims off of the bridge (Tr. 866). The trial court struck Doss, because it did not believe that Doss had been adequately rehabilitated with respect to acting with another (Tr. 900). Petitioner did not challenge this finding (Tr. 900). In light of the inconsistent answers given by Doss, the trial court was not compelled to accept Doss' assessment of his own capabilities.

The Missouri Supreme Court properly found the following:

> While a trial court cannot exclude a juror from a capital punishment case simply because of a conscientious objection to the death penalty, a juror may be excluded if his views would "prevent or substantially impair the performance of his duties as a juror in

> accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). The trial court has broad discretion in determining whether a prospective juror is "death qualified," as the trial judge is to a superior position to evaluate the demeanor and testimony of the prospective jurors. State v. McMillin, 783 S.W.2d 82, 93 (Mo. 1990)[cert. denied 111 S.Ct. 225 (1990)].
>
> Doss's equivocal and shifting responses to questions focusing on his ability to impose the death penalty provide a sufficient rationale for the trial court's decision to sustain the state's motion. In light of Doss's conflicting testimony, the trial court did abuse its discretion in striking Doss for cause.

State v. Clemons, supra at 225.

As this Court recognized in Wainwright v. Witt, supra 469 U.S. at 424-425, "many venirepersons simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing a death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." The trial court's determination of the venireman's state of mind is a finding based upon demeanor and credibility that are peculiarly within the trial judges province. Id. 469 U.S. at 429.

The trial court acted within its discretion, when

confronted with conflicting answers from venireperson Doss, by determining that some of venireperson Doss' answers concerning his ability to impose the death penalty were not credible, that Doss' answers concerning his inability to impose the death penalty were credible, and that Doss was not qualified to sit as a juror in a death-penalty case. State v. Kinder, 942 S.W.2d 313, 324-325 (Mo. banc 1996).

This case presents no issue worthy of this Court's review. It was properly decided based on well-settled precedent from this Court.

III. No Improper Duplication Of Statutory Aggravating Circumstances Occurred

Petitioner appears to claim that the trial court erred by submitting two statutory aggravating circumstances to the jury, because those circumstances are allegedly improperly duplicative and Missouri is allegedly a weighing state (Petition at 24-27). However, as will be demonstrated below, both of these claims are false.

Petitioner claims that the statutory aggravating circumstance -- whether the defendant committed the murders of Robin and Julie Kerry while the defendant was knowingly aiding or encouraging Marlin Gray and Antonio Richardson in the perpetration or attempt to perpetrate robbery, §565.032.2(11), RSMo 1994, was improperly duplicative of the statutory aggravating circumstance -- whether the defendant murdered Robin and Julie Kerry for the purpose of the defendant and Marlin Gray and Antonio Richardson receiving money or any other thing of monetary value from Thomas Cummins, §565.032.2(4), RSMo 1994.

"Missouri is a 'non-weighing' state." Kilgore v. Bowersox, No. 96-2563EM, slip op. at 9 (8th Cir. September 8, 1997); Sidebottom v. Delo, 46 F.3d 744 (8th Cir. 1995), cert. denied 116 U.S. 144 (1995); LaRette v. Delo, 44 F.3d 681, 687 n. 4 (8th Cir. 1995), cert. denied 116 U.S. 246 (1995). As in the State of Georgia, from whence Missouri statutory scheme was taken, see State v. Mercer, 618 S.W.2d 1, 5 (Mo. banc 1981), cert. denied 454 U.S. 933 (1981), a statutory aggravating circumstance is a mere legal conclusion which, at the threshold, allows the sentencer to consider the possibility of a death sentence. State v. Shaw, 636 S.W.2d 667, 675 (Mo. banc 1982), cert. denied 459 U.S. 928 (1982); see Zant v. Stephens, 462 U.S. 862, 870-872, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Once this threshold is crossed, the

sentencer considers "all evidence" (emphasis in original) in identifying facts and circumstances which aggravate or mitigate punishment. State v. Shaw, supra at 675; State v. Brown, 902 S.W.2d 278, 296 (Mo. banc. 1994), cert. denied 116 S.Ct. 679 (1995); State v. LaRette, 648 S.W.2d 96, 102 (Mo. banc 1983), cert. denied 459 U.S. 1137 (1983); Zant v. Stephens, supra, 462 U.S. at 872-873.[1] The legal conclusion that an aggravating circumstance exists does not play any role in guiding the sentencing body in the exercise of its discretion, apart from narrowing the class of persons convicted who are eligible for the death penalty. Id. Under this sentencing scheme, there need be only one valid finding of a statutory aggravating circumstance, and a defendant is prejudiced in the determination of sentence only if error is made in the evidence that the sentencer is allowed to consider. Id., 462 U.S. at 873.

The Missouri Supreme Court properly recognized in the case at bar, that petitioner's claim that the jury was mislead by improper duplication was without merit. State v. Clemons, supra at 232. Since statutory aggravating

---

[1]The description of the Georgia system in Zant v. Stephens, supra at 874 which follows is applicable to Missouri: "In Georgia, unlike some other states, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." Moreover, in Missouri jurors are not required to make a written finding of any mitigating circumstances, and the jurors have discretion to impose a life sentence regardless of whether the aggravating evidence is outweighed by mitigating evidence. State v. Petary, 790 S.W.2d 243, 245-246 (Mo. banc 1990), cert. denied 498 U.S. 973 (1990).

circumstances merely open the door to consideration of capital punishment, at which point the jury considers all the evidence, petitioner's "duplication" theory is meaningless. State v. Ramsey, supra; State v. Brown, 902 S.W.2d 278, 293 (Mo. banc 1995), cert. denied 114 S.Ct. 1664 (1994). Even if duplication occurred, it would not be prejudicial. State v. Zeitvogel, 707 S.W.2d 365, 369-370 (Mo. banc 1986), cert. denied 479 U.S. 871 (1986).

Moreover, the statutory aggravating circumstances in question are not duplicative, because "they emphasize different facets of criminal activity." State v. Jones, 749 S.W.2d 356, 365 (Mo. banc 1988), cert. denied 488 U.S. 871 (1988); Kilgore v. Bowersox, supra at 9. The first one had to do with the defendant's greed, and the second one had to do with the use of force. State v. Jones, supra at 365; State v. Griffin, 756 S.W.2d 475, 489 (Mo. banc 1988), cert. denied 490 U.S. 1113 (1989); State v. Wise, 879 S.W.2d 494, 521 (Mo. banc 1994), cert. denied 115 S.Ct. 757 (1995); State v. Smulls, 935 S.W.2d 9, 23 (Mo. banc 1996), cert. denied 117 S.Ct. 2415 (1997). Thus, this case presents no issue that warrants review from this Court.

CONCLUSION

In view of the foregoing, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

Breck K. Burgess

BRECK K. BURGESS
Assistant Attorney General
Missouri Bar No. 34567

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321
Attorneys for Respondent

No. 97-484

FILED
OCT 21 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

REGINALD CLEMONS,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITIONER'S REPLY BRIEF

JAMES J. HAGAN
Counsel of Record

SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000

Attorneys for Reginald Clemons

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

POINT I. RESPONDENT'S ARGUMENT THAT "NO, SIR" DOES NOT MEAN "NO, SIR" IS MERITLESS, INCONSISTENT WITH THIS COURT'S PRIOR RULINGS, AND DEPRIVES FIFTH AMENDMENT PROTECTIONS OF ALL MEANING 1

POINT II. RESPONDENT IGNORES THE CLEAR RECORD IN THIS CASE WHICH ESTABLISHES BEYOND DISPUTE THAT VENIREPERSON DOSS COULD HAVE APPLIED THE DEATH PENALTY 2

POINT III. THE DOUBLE-COUNTING OF AN AGGRAVATING FACTOR WAS CONSTITUTIONAL ERROR UNDER MISSOURI'S "WEIGHING" SENTENCING SCHEME 4

Page

A. At Most, Respondent's Brief Raises a Constitutional Issue That This Court Has Yet To Address: What Standard of Review Applies to "Hybrid" Jurisdictions? 5

B. The Lack of a Standard of Review for "Hybrid" Jurisdictions Has Caused Confusion and Unconstitutionally Inconsistent Applications of the Death Penalty 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases	*Page(s)*
Clemons v. Mississippi, 494 U.S. 738 (1990)	4-6
Davis v. Executive Dir. of Dep't of Corrections, 100 F.3d 750 (10th Cir. 1996)	5, 6
Flamer v. Delaware, 68 F.3d 736 (3d Cir. 1994), *cert. denied*, 116 S. Ct. 807 (1996)	5
Gray v. Mississippi, 481 U.S. 648 (1987)	3
Gregg v. Georgia, 428 U.S. 153 (1976)	7
Loving v. United States, 41 M.J. 212 (U.S. Armed Forces 1994)	6, 7
Michigan v. Mosley, 423 U.S. 96 (1975)	1
Miranda v. Arizona, 384 U.S. 436 (1966)	1
Oregon v. Bradshaw, 462 U.S. 1039 (1983)	2
People v. Todd, 607 N.E.2d 1189 (Ill. 1993)	6, 7
Schneider v. Delo, 890 F. Supp. 791 (E.D. Mo. 1995)	4
Smith v. Illinois, 469 U.S. 91 (1984)	1
State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992)	4

Page(s)

Stringer v. Black, 503 U.S. 222 (1992) 4

Wainwright v. Witt, 469 U.S. 412 (1985) 3

Zant v. Stephens, 462 U.S. 862 (1983) 4-7

Statutes

C.R.S.A. §§ 16-11-103(2)(a) 6

Mo. Rev. Stat. § 565.030(4)(4) 5

Mo. Rev. Stat. § 565.030(4)(3) 4

Other Authorities

Marcia A. Udder, Note, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Realty Phase of the Capital Trial*, 68 Tul. L. Rev. 1341 (1994) 7

Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 Tex. L. Rev. 441 (1994) 4

POINT I.

RESPONDENT'S ARGUMENT THAT "NO, SIR" DOES NOT MEAN "NO, SIR" IS MERITLESS, INCONSISTENT WITH THIS COURT'S PRIOR RULINGS, AND DEPRIVES FIFTH AMENDMENT PROTECTIONS OF ALL MEANING

Respondent acknowledges that "if an individual unequivocally indicates that he wishes to remain silent, 'interrogation' must cease." Resp't Br. at 4. Yet petitioner's "no, sir" in response to the question of whether he wished to make a statement could not have been more unequivocal. The police were therefore obligated to honor petitioner's request by immediately ceasing the interrogation for a "significant" period of time. *See Michigan v. Mosley*, 423 U.S. 96, 106 (1975).

Respondent's effort to justify the continued questioning of petitioner is directly at odds with the rulings of this Court. First, respondent argues that "indecisive" defendants are not entitled to constitutional protections. Resp't Br. at 4. But such a contention cannot be reconciled with this Court's rulings in *Miranda v. Arizona*, 384 U.S. 436, 473 (1966), that a defendant can invoke his rights "in any manner, at any time prior to or during questioning," and in *Mosley* that a defendant's right to terminate questioning must be scrupulously honored. 423 U.S. at 106.[1]

Respondent's argument ultimately proves too much. If a defendant does not immediately assert the right to remain silent, by

---

1. Respondent cites inapposite Missouri precedents for the proposition that the police may continue an inquiry where the defendant's response was unclear on its face. Here, however, because petitioner's words could not have presented a clearer articulation of his desire to remain silent, "clarification" was neither necessary nor permissible. Moreover, respondent's reliance on petitioner's subsequent statements to validate its violation of his rights is an "untenable" post hoc rationalization. *Smith v. Illinois*, 469 U.S. 91, 97 (1984).

respondent's logic, the police can always construe a subsequent invocation as ambiguous, concluding after the fact that "he simply misspoke." Resp't Br. at 5. The purpose of this Court's prophylactic rule, however, was not to widen police discretion, but to rein it in to prevent precisely the type of abuse that occurred here. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983).

POINT II.

RESPONDENT IGNORES THE CLEAR RECORD IN THIS CASE WHICH ESTABLISHES BEYOND DISPUTE THAT VENIREPERSON DOSS COULD HAVE APPLIED THE DEATH PENALTY

Respondent contends that the trial court's *sua sponte* striking of death-scrupled venireperson Virto Doss was "within its discretion." Resp't Br. at 9. But respondent avoids quoting the record in this case which demonstrates beyond peradventure that Doss could have applied the death penalty in appropriate circumstances despite his initial reluctance.[2] The trial court made no findings as to Doss's credibility, but rather relied on "recollection" and "notes" in striking Doss for cause when no motion to strike was pending. App. at 147a. The trial court's

---

2. Respondent's recitation of the facts is completely flawed. For instance, respondent wrongly asserts that petitioner did not preserve the argument for appeal, Resp't Br. at 8, when the record makes clear that a timely objection was made. *See* App. at 147a ("Judge . . . I asked him if he could follow the instructions, and he understood the difference between the two. He certainly did."), 148a ("[W]e make objection to all of these strikes of course, all of these strikes."). Similarly, respondent errs in stating that Doss "did not say" whether he could sentence an accomplice to death. In fact, Doss *explicitly* and *repeatedly* stated that he could vote for the death penalty even if the evidence showed that petitioner himself did not kill the victims. App. at 133a.

unwarranted action violated petitioner's rights under the Sixth Amendment.

On this record, no reasonable person could conceivably be left with the "definite impression" that Doss "would be unable to faithfully and impartially" apply the law. *Wainwright v. Witt*, 469 U.S. 412, 429 (1985). After his initial qualms about the death penalty, Doss—*on six separate occasions*—stated without equivocation or elaboration that he could apply the death penalty. *See* App. at 131a ("Not after you present me with the facts, I can"), 132a ("No."), 133a ("Yes."), 133a ("Yes."), 139a ("Yes."), 140a ("Yes."). Continued questioning by both sides left no doubt that, despite his scruples, Doss was willing to vote for the death penalty under appropriate circumstances. Even the State did not move to strike Doss for cause, lending further credence to the notion that Doss was a qualified, suitable juror. The trial judge's subsequent "recollection" regarding Doss's statements was simply erroneous. App. at 147a.

The most cursory examination of the transcript of Doss's voir dire, *see* App. at 130a-140a, reveals that he is precisely the type of juror to whom the logic of *Gray v. Mississippi*, 481 U.S. 648 (1987) and *Wainwright v. Witt*, 469 U.S. 412 (1985), applies. If the groundless striking of venireperson Doss did not violate petitioner's rights under the Sixth Amendment, it is difficult, if not impossible, to imagine a potential juror to whom this Court's ruling in *Gray* and *Wainwright* might apply. Respondent's meritless argument would render this Court's Sixth Amendment jurisprudence utterly meaningless.

POINT III.

THE DOUBLE-COUNTING OF AN AGGRAVATING FACTOR WAS CONSTITUTIONAL ERROR UNDER MISSOURI'S "WEIGHING" SENTENCING SCHEME

Missouri is a "weighing" jurisdiction, because the "weighing" process is integral to its death penalty statute. *See* Pet'r Br. at 27-28. The Missouri statute explicitly requires juries to determine whether the mitigating evidence is "sufficient to outweigh the evidence in aggravation." Mo. Rev. Stat. § 565.030(4)(3). Thus, several courts—including the Missouri Supreme Court—have held that Missouri is properly considered a "weighing" jurisdiction. *See, e.g., Schneider v. Delo*, 890 F. Supp. 791, 827 n.11 (E.D. Mo. 1995); *State v. Whitfield*, 837 S.W.2d 503, 511-12 (Mo. banc 1992); *see also* Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 Tex. L. Rev. 441, 462 (1994).

Because Missouri is a weighing jurisdiction, the presence of an invalid aggravating circumstance—in this case one that was double-counted—means that petitioner's death sentence cannot stand unless the error is independently found to be "harmless." *See Clemons v. Mississippi*, 494 U.S. 738, 750-52 (1990).[3]

---

3. Whether a jurisdiction is deemed to employ a "weighing" or a "non-weighing" scheme is, as this Court has recognized, a determination of "critical importance." *Stringer v. Black*, 503 U.S. 222, 231 (1992). Erroneous aggravating factors must be reviewed for harmless error in "weighing" jurisdictions because it is impossible to determine whether an improper aggravating factor "skew[s]" the jury's calculations. *Id.; see also Clemons*, 494 U.S. at 750-52. Under non-weighing schemes, no such harmless error review is required. *See Zant v. Stephens*, 462 U.S. 862, 870 (1983).

A. At Most, Respondent's Brief Raises a Constitutional Issue That This Court Has Yet To Address: What Standard of Review Applies to "Hybrid" Jurisdictions?

Respondent cites without analysis separate authority in support of its contention that Missouri's capital sentencing scheme should be considered "non-weighing," *see* Resp't Br. at 11-12, but does not, and cannot, contest that Missouri's statute directs juries to weigh mitigating evidence against aggravating evidence.

Instead, respondent raises only the obvious fact that, after weighing mitigating factors, a jury in Missouri retains discretion not to impose the death penalty. *See* Mo. Rev. Stat. § 565.030(4)(4). Although the mere presence of such a "non-weighing" element does not alter the fact that weighing is required, respondent's argument in its best light suggests that Missouri could be characterized as a "hybrid" jurisdiction. If respondent's argument has any merit at all, it presents a new question which may be stated as follows:

> Whether a capital sentencing scheme which combines elements of both "weighing" and "non-weighing" statutes (*i.e.*, a "hybrid" scheme) is governed by the harmless error analysis set forth in *Clemons v. Mississippi*, 494 U.S. 738 (1990), or the lesser standard of *Zant v. Stephens*, 462 U.S. 862 (1983)?

This Court has "never . . . explicitly answered the question [of] whether *Clemons* or *Zant* control when a death sentence is imposed under what is best described as a 'hybrid' scheme—one which consists of both 'weighing' and 'non-weighing' characteristics." *Flamer v. Delaware*, 68 F.3d 736, 769 (3d Cir. 1994) (Lewis, J., dissenting), *cert. denied*, 116 S. Ct. 807 (1996); *see also Davis v. Executive Dir. of Dep't of Corrections*, 100 F.3d 750, 767 (10th

Cir. 1996). To the extent that Missouri may be considered a "hybrid" state, petitioner respectfully requests that the Court grant the petition to settle the question of how the Eighth Amendment applies in such jurisdictions.

B. The Lack of a Standard of Review for "Hybrid" Jurisdictions Has Caused Confusion and Unconstitutionally Inconsistent Applications of the Death Penalty

Left without this Court's guidance, the jurisdictions that have "hybrid" sentencing schemes differ greatly about what standard of review applies, causing unconstitutionally arbitrary and inconsistent application of the death penalty.

At least three other jurisdictions employ capital sentencing schemes that contain both "weighing" and "non-weighing" elements: *Colorado*;[4] (ii) *Illinois*;[5] and (iii) *U.S. Armed Forces*.[6] These jurisdictions disagree as to whether the introduction of an improper aggravating factor is reviewed under *Clemons* or *Zant*.

Colorado's hybrid scheme, for example, which admittedly contains both weighing and non-weighing elements, is reviewed under the "weighing" standard set forth in *Clemons*. *See Davis*, 100 F.3d at 766. Similarly, the U.S. Armed Forces has applied *Clemons*

---

4. *See* C.R.S.A. §§ 16-11-103(2)(a)(II) and (III); *Davis*, 100 F.3d at 766 (characterizing Colorado's scheme as "hybrid").

5. *See People v. Todd*, 607 N.E.2d 1189, 1197 (Ill. 1993) (applying the *Zant* "non-weighing" standard of review despite presence of statutory weighing factors).

6. *See Loving v. United States*, 41 M.J. 212, 248 (U.S. Armed Forces 1994) (noting that "Rule for Courts-Martial" ("RCM") 1004 is a "hybrid" scheme).

to its hybrid sentencing scheme. *See Loving*, 41 M.J. at 248. Illinois, however, which also has weighing and non-weighing elements, has applied the standard of review in *Zant*. *See Todd*, 607 N.E.3d at 1197. If Missouri can be considered a "hybrid" state, the ruling of the court below suggests that it disagrees with Colorado and the U.S. Armed Forces as to what standard of review applies.

These inconsistencies among jurisdictions can result in similarly situated defendants receiving the most widely disparate treatment possible: some have their sentences overturned while others are put to death. *See generally* Marcia A. Udder, Note, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 Tul. L. Rev. 1341 (1994). Capital punishment dispensed in this manner is inherently "arbitrary and capricious," and, therefore, violates the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). If Missouri is deemed a "hybrid" jurisdiction, this Court should grant the petition to resolve the sharp disputes among different jurisdictions as to how the Eighth Amendment applies under these circumstances.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

October 21, 1997

Respectfully submitted,
/s/ JAMES J. HAGAN

JAMES J. HAGAN
Counsel of Record
Edward D. Johnson
Glenn S. Leon
Jeffrey A. Simes

SIMPSON THACHER & BARTLETT
(a partnership which includes
professional corporations)
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000

Attorneys for Reginald Clemons